IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 288 MISC.

HARRY C. STEINMETZ,

Petitioner,

v.

CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as State Director of Education, and CALIFORNIA STATE PERSONNEL BOARD

*****

PETITION FOR WRIT OF

CERTIORARI TO THE SUPREME

COURT OF THE STATE OF CALIFORNIA

****

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Petitioner, HARRY C. STEINMETZ, respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of California, in order to review its judgment denying a Writ of Mandate directing that petitioner be reinstated to his position as Associate Professor at San Diego State College.

OPINIONS BELOW

The decision and opinion of the California State Personnel Board (R. ; Am. Pet. Exh. D)[1/] the administrative agency involved in this case, is appended hereto as Appendix "A".

1/ The record in the court below was not printed or otherwise consecutively numbered. It consists of six parts: the amended and supplemental petition for writ of mandate, herein referred to as Am. Pet.; the transcript of hearing before the State Personnel Board, hereinafter referred to as St. Pers. Bd.; the Return to the Petition, hereinafter referred to as Return; the Petition for Hearing in the court below, hereinafter referred to as Pet. for Hrg.; the Answer to Pet. for Hrg.; the Reply to Answer; and the two opinions of the justices of the court below, hereinafter referred to as Op. and Diss. Op.

The original petition for writ of mandate was filed in the California District Court of Appeal, Third Appellate District. The opinion of that court (Pet. for Hrg. Appx. A) does not appear in the California permanent official reports. It appeared at 126 A.C.A. 192 and is reported at 271 P. 2d 614. It is appended hereto as Appendix "B".

The opinion of the court below, (Op. and Diss. Op.) (Justice Jesse W. Carter dissenting) is reported at 44 A.C. 863 and 285 P. 2d 617. It is appended hereto as Appendix "C".

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The judgment sought to be reviewed is dated July 5, 1955 and the time of its entry is the same (Op. 1);

2. Petition for rehearing was not filed and no extension of time within which to petition for certiorari was sought;

3. This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28 USC 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. May a state discharge a public employee, for refusal to answer questions as to whether he was or is a member of the Communist Party, where such questions specifically exclude from consideration scienter on the part of the employee as to the wrongful nature of the Communist Party and where the state simultaneously provides for the discharge of the employee for such innocent membership?

2. Where a state public employee has answered, under oath, directly, clearly and unequivocally, that he is not a member of any organization, including, specifically and by name, the

Communist party, that to his knowledge advocates the overthrow of government by force or violence, and has never been such a member, may a state discharge the employee for refusal to answer questions as to whether he is or was a member of the Communist Party, where such questions specifically eliminate from consideration scienter on the part of the employee of the wrongful nature of the Communist Party?

3. Under the facts present in questions 1 and 2, where the refusal to answer is based on the ground of conscience, is the right not to answer protected by the freedom of religion provision of the First and Fourteenth Amendments; or by the freedom of thought and association guarantees of these amendments, or by the Due Process Clause of the Fourteenth Amendment?

STATUTE INVOLVED

The statute involved is California Statutes, 1953, Chapter 1646. It is commonly referred to in California as the Luckel Act. It appears as California Government Code 1027.5 and note, 1028 and 1028.1. The entire text of the statute is set forth hereinafter as Appendix "D".

Briefly summarized, the statute provides as cause for dismissal from public employment (1) personal advocacy of overthrow of the government by force or violence, (2) knowing membership in the Communist Party, (3) knowing membership in an organization which during the time of his membership he knows advocates overthrow of the government by force or violence; (Govt. Code 1028) and it provides for dismissal of any employee who refuses to answer on <u>any</u> ground questions pertaining to (a) personal advocacy of the forceful or violent overthrow of the government, (b) present knowing membership in an organization now advocating the forceful or violent overthrow of the government, (c) past knowing membership, since September 10, 1948, in any organization which to the knowlege of the

employee during the time of membership advocated the forceful or violent overthrow of the government, and (d) present or past, since September 10, 1948, knowing membership in the Communist Party. (Govt. Code 1028.1).

STATEMENT OF THE CASE

Petitioner was employed on the faculty of San Diego State College for 23 years, namely since 1930. (Am. Pet. 1). At the time of the event here involved he was an Associate Professor.

Purporting to act pursuant to the Luckel Act, respondents Board of Education and Director of Education, directed petitioner to appear before them on January 28, 1954, to answer questions concerning his political beliefs and associations (Am. Pet. 3).

No charge of unprofessional conduct, nor of any other conduct giving cause for discharge was lodged against petitioner at this time, nor at any other time during his long years of service (Am. Pet. 3, 4); nor was any charge made then or at any other time that petitioner entertained prohibited beliefs or belonged to any proscribed organization. This, despite the fact that under California law a teacher at a state college is subject to dismissal for the advocacy of communism (Ed. C. 20398(d)), as well as for membership in communist organizations, or for participation in public meetings conducted or sponsored by such organizations as well as for advocacy of the overthrow of government by force and violence either on or off campus. (Ed. C. 20398(a) (b) (c) and Govt. C. 1028).

At the session, petitioner was sworn and was asked a number of questions concerning his political beliefs and associations. He answered all the questions put to him, except two.

First, as to the many questions he did answer -- directly, fully and unequivocally: these questions pertain to scienter. Thus he stated categorically (Am. Pet., Exh. A, 21): "I have never in my life, now, in the past, and so long as I would be a state em-

ployee, would never belong to an organization, that advocated force and violence against the United States, this state or any subdivision thereof. I took an oath, the Levering Act oath,[2] and signed it honestly."

He answered all questions pertaining to membership in organizations advocating violence, expressly denying such membership.

Specifically, with respect to the Communist Party (Am. Pet., Exh. A, 21, 25, 26) when asked: "Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to your knowledge, it advocated the forceful or violent overthrow of the government of the United States or of any state?", he unhesitatingly gave answer "no", explaining that "no" applied "(t)o my advocacy, and to my knowledge, and to membership with knowledge."

But with respect to membership in the Communist Party, past and present, absent scienter, that is, with respect to innocent membership -- or to put it another way, with respect to membership qua membership, he refused to answer.[3]

Petitioner refused to answer the two questions firstly

2/ Required by California Government Code, Section 3103.

3/ The two questions unanswered as put to the petitioner by the Board read (Am. Pet., Exh. A, 20):

"Are you knowingly a member of the Communist Party?";

and,

"Have you at any time since September 10, 1948 knowingly been a member of the Communist Party?"

The Supreme Court of California interpreted the word "knowingly", as used in the statute and as used by the Board, as meaning merely (Op. 9) "knowledge of the fact of membership"; and construed the statute as requiring "an employee to answer questions as to his membership in the Communist party without regard as to knowledge of the nature of the party". This Court will, of course, be bound, as to the meaning of the statute, by the interpretation placed upon it by the California Courts.

Moreover, it is reasonably clear that the petitioner himself, as the court below points out (Op. 7) so understood the two questions unanswered.

on the ground of conscience (Am. Pet. Exh. A, 20), based as he stated, upon a sincere and conscientious effort to live under the Constitution of the United States as he understands it (Ibid 28-35). His actions were based, as he put it, upon a feeling of responsibility (Ibid, 33) as an individual living in and under our national traditions as a descendant of ancestors who fought in the American Revolution (Ibid, 32), and as an educator charged with the duty of cherishing freedom, (Ibid 34) and democracy (Ibid, 35). His challenge to the authority of the respondents and to the legislation involved[4] was respectful, courteous and entirely in the tradition of the orderly testing of the powers of government.[5]

Thereafter, for so refusing to answer, petitioner was dismissed (Am. Pet. Exh. B).

Petitioner appealed the dismissal under the California procedure to the State Personnel Board before which, by his request for the appeal (Am. Pet. Exh. C), legal memorandum and argument (St. Pers. Bd., 68-87), he raised and argued the federal questions pressed here. These arguments were rejected by the respondent Personnel Board and the dismissal affirmed (Am. Pet. Exh. D; Appx. A, infra 1).

Thereafter, by amended petition for writ of mandate for reinstatement filed in the District Court of Appeal, petitioner raised and reargued these points again. (Am. Pet. 5-7). That court likewise rejected them. (Appx. B, infra, 5-9). And the same points were raised and argued by petitioner in his petition for hearing in

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4/ Justice Carter, in his dissent (Diss. Op. 15-21) quotes enough from the petitioner's testimony before the Board, to afford this Court an insight into the kind of man the petitioner is. Justice Carter was of the view that the petitioner is a loyal American; and that his ordeal before the Board was not too different from that of "the witness called before the ecclesiastical courts or the Star Chamber in England in the 15th, 16th or 17th Centuries." (Diss. Op. 21).

5/ Am. Pet., Exh. A, 34: "I oppose that (the power of the Board and the Legislature to ask the particular questions) in principle and shall continue to oppose it if it is necessary until the Supreme Court passes upon it."

the court below, (Pet. for Hrg. 5-6, 9-18) which court likewise, one justice dissenting, ruled against petitioner. (Op. 9-12, 14; Appx. C, infra, 7-8, 10).

REASONS FOR ALLOWANCE OF THE WRIT

1. This Court has noted probable jurisdiction in Slochower v. Board of Higher Education of the City of New York, No. 23, Oct. Term 1955, 348 U.S. 935. The issues in that case and in the case at bar are similar;[6] we admit they are not identical.

But Slochower and Steinmetz have this in common: before deciding Slochower, this Court will apply, and we hope explain, the effect of Wieman v. Updegraff, 344 U.S. 183; the instant petition will require the same of this Court. For at the heart of this case is whether it falls within, or beyond the pale of, Wieman. The majority of the court below distinguish Wieman; Justice Carter dissented precisely because of his view, to the contrary that Wieman was decisive in Steinmetz.[7]

Moreover, at least in one respect, the California statute as applied here, is more offensive to due process than the New York charter provision at issue in Slochower, in that the California legislation expressly provides for dismissal for membership in the Communist party, absent scienter. (Government Code 1028).

In New York, neither the City Charter provision at issue in Slochower, nor the Feinberg law, as interpreted by the New

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6/ Cf. Justice Carter, dissenting in the court below (Diss. Op. 22): "In the Slochower case the Supreme Court of the United States has noted probable jurisdiction. I am confident that the Supreme Court of the United States will reverse the state court decision in the Slochower case. I feel even more strongly that the Supreme Court of the United States should reverse the erroneous decision of the majority of the court in the present case."

7/ Justice Carter said: "I dissent from the holding of the majority here because I believe ... that Government Code 1028.1, as it has been construed by the majority in this case, is unconstitutional under the views expressed in the Wieman, Gerende, Garner, Adler ... cases." (Diss. Op. 22, 23; Appx. C, infra, 27).

York courts, and by this Court in Adler v. Board of Education, 342 U.S. 485, 494,[8/] permits discharge for membership in the Communist party, qua membership, and absent scienter.

That the California statute so provides will be discussed more fully infra, at page 12.

2. The instant Petition raises an issue expressly left open by this Court in Garner v. Los Angeles Board, 341 U.S. 716; and that issue should be determined here.

In Garner, 341 U.S. 716, 720, this Court made it clear that, "not before us is the question whether the City may determine that an employee's disclosure of such political association justifies his discharge". In this case, that question is now before this Court; and this Court should answer that question now and in this case.

3. There is a conflict among the state courts as to the meaning of Wieman, and the interpretation that should be given to statutes enacted subsequent to, and in the light of this Court's decision in, Wieman. Thus the Pennsylvania Supreme Court in Fitzgerald v. Pennsylvania, 376 Pa. 379, 102 Atl. 2d 887, upheld a Pennsylvania law requiring an oath re membership. In so doing it distinguished the Wieman case, saying (102 Atl. 2d at 891): "But our statute is subject to no such infirmity because it does not interdict innocent membership; it is only the deliberate and purposeful joining, with knowledge of the organizations objectives and activities that is within the contemplation of the statute..." Accordingly, it limited inquiry, by oath, into membership accompanied by scienter; the court below required no such limitation.

4. The court below in its decision has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court such as Wieman, Garner, Adler and Gerende v. Board of Supervisors, 341 U.S. 56. This will be developed

8/ Cf. This Court's views as to the import of Adler, in Wieman at p. 189.

more infra at p. 10-14.

5. The legislation involved, here, its application, and the recurring serious constitutional questions which it presents, are of wide public importance of the same magnitude which prompted this Court to note probable jurisdiction or to grant certiorari in Wieman v. Updegraff; 344 U.S. 183, Garner v. Board of Public Works, 341 U.S. 716; Adler v. Board of Education, 342 U.S. 485; Gerende v. Board of Supervisors, 341 U.S. 56 and Slochower v. Board of Higher Education, No. 23 Oct. Term, 1955, 348 U.S. 935.

At issue in this case is not merely the right of a single university professor who has served competently and faithfully for years without, even through this very proceeding, giving cause for dissatisfaction as to the manner in which he performed the duties of his position. Nor is involved merely the rights of the rest of the many thousands of public servants, both academic and non-academic, in the state of California. Rather is this case concerned with the rights of conscience of the many thousands of teachers and the many millions of public employees throughout the nation. For California is not alone in the type of legislation here challenged. There has been a veritable rash of such legislation all over the country. Appended hereinafter as Appendix "E" is a list, believed to be accurate and current, showing the states having, and references to the, statutes, similar to that here involved. Of particular interest is the number of statutes which like California, have dealt with the element of scienter since this Court's decision in Wieman.[9/]

Certiorari should be granted in order that there be early guidance as to the effect, extent and validity of this new type of legislation.

In any event, and at the very least, the question is one of importance and of a recurring nature which calls for the

9/ Georgia, Michigan, Oklahoma, Pennsylvania, Texas, Illinois.

grant of certiorari by this Court, within the requirements of Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 170.

A R G U M E N T

I

THE DISCHARGE OF THE PETITIONER DEPRIVED HIM OF LIBERTY AND PROPERTY IN VIOLATION OF DUE PROCESS, BECAUSE ARBITRARY AND UNREASONABLE

The court below construed the statute as requiring (Op. 9, Appx. C, infra, 7): "an employee to answer questions as to his membership in the Communist party without regard to his knowledge of the nature of the party."

But Wieman held, and said, precisely the contrary. Thus this Court said (344 U.S. at 190, 191):

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. ...
>
> "... Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

The court below, ignoring this clear statement, sought to justify its holding by saying (Op. 9; Appx. C, infra, 7):

> "... Petitioner's discharge was not because of membership in a proscribed organization but because of his refusal to answer questions as to whether or not he held membership in the Communist Party."

But this was precisely the case in Wieman. There too, petitioners were not discharged because of membership in any proscribed organization, but precisely because they refused to state

under oath that they were not members of the proscribed organizations, when such statement under oath did not, as interpreted by the state court there, include the requirement of scienter. There can be no valid distinction drawn, we believe, because the issue arose in Wieman by way of an oath requirement, while here it arose in the form of requiring statements under oath in answer to questions at a hearing. The District Court of Appeal below correctly noted (Appx. C, infra, 4; 271 P. 2d at 616), that there was no difference between the affidavit method and the question and answer method.[10/] The inroad on opinion, association, and privacy, is the same whether the requirement is either by a declaration, under oath, of non-membership in organizations; or by affidavit under oath, of such non-membership; or by questions and answers, under oath as to such membership or non-membership.

Each of the three methods, similarly and equally repress, instead of "foster those habits of open-mindedness and critical inquiry which alone make for responsible citizenship" (Mr. Justice Frankfurter in Wieman at 196). In any event, if there is such a distinction, the California courts are the first in the nation to draw such a distinction; for the guidance of the remaining courts in the nation, the last word on the subject from this Court, now, would be helpful.

Nor can the effect of this Court's decision in Wieman be escaped by the circuitous reasoning of the court below (Op. 10-12, 15; Appx. C, infra, 7, 10), that this was merely an inquiry by the respondent Board and Director of Education into matters pertaining to petitioner's associates, from which will be ascertained his "loyalty", and from which will be determined his fitness as an employee. Like the Oklahoma statute, whose purpose "was to make

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10/ Cf. Appendix E, hereinafter, where other states are now using the question-answer method; e.g. Georgia, Hawaii, Louisiana, New Hampshire, Washington, Mississippi, Pennsylvania.

loyalty a qualification to ... be employed by the State" and "to force officers of the state who are or have been within a fixed time members of the Communist Party or other subversive organization out of governmental positions." (205 Okla. 301, 305); the same is true here.[11] (Govt. Code 1027.5, 1028). But Wieman teaches that a state cannot require a statement under oath that one is not a member of such a proscribed organization, when that statement is demanded absent the requirement of scienter; for otherwise the state would be lumping the innocent with the guilty, in violation of due process.

The reliance of the court below on Adler and Garner is, we believe, misplaced. In Adler, as this Court pointed out in Wieman, (at p. 189) the New York courts had expressly construed the Feinberg law to require knowledge of organizational purpose. And in Garner, (at p. 720), membership in the Communist Party, information as to which was asked for by the affidavit requirement, whether innocent or with scienter, was not made a ground for discharge. The distinction is pointed up by this Court's action, in sustaining the oath requirement in Garner, which oath sought information, inter alia, as to whether the employee belonged to a proscribed type of organization which fact, if true, rendered the employee ineligible for employment, only if such sought for information contained the element of scienter on the part of the employee as to the nature of the organization.

So here. Since by the statute (Govt. Code 1028)[12] knowing membership in the Communist Party subjects the employee to dismissal, under the Adler, Gerende, Garner, Wieman principle, the state is entitled to information as to membership, only if the information sought includes knowledge on the part of the employee as

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11/ Indeed, more is true here; for here, the Petitioner did answer all questions as to association, other than innocent association. And he certainly replied to all inquiries pertaining to his loyalty. More, no state may require, under our Constitution, "so long as this Court sits".

12/ And also Calif. Education Code § 20398(a).

to the nature of the organization. And since, as interpreted by by the court below, that information was not sought of petitioner, in the two questions he did not answer, the requirement is one of disclosure of innocent membership. Such a requirement is unreasonable and arbitrary, and hence offends due process.

We respectfully submit, therefore, that the effort of the court below to distinguish this case from Wieman must fail. The dissenting justice below put it this way (Diss. Op. 6-7; Appx. C, infra, 14-15):

> "... Unlike the majority, I can find no substantial distinction between those statutes and the statute here considered. For refusal under oath to deny membership, the victim must be discharged under the terms of Government Code, section 1028.1. If he does answer, and his answers indicate membership in a proscribed organization, he may be discharged under the terms of the companion section, 1028."

Likewise is the court below in error, when it suggests that petitioner is attacking the validity of Government Code 1028. No such direct attack was made; nor is it made here. However, the fact that the validity of that section was not put in question does not justify ignoring the section; or pretending that it does not exist on the ground that petitioner was not discharged for membership, but rather for failing to state whether he had membership. The same was true in Wieman.

In Wieman, as here, the state employees were not discharged for membership in an organization; they were dismissed for refusal to state, under oath, where they were members; so here. Yet, in Wieman, this Court noted that under the Oklahoma Statute "the fact of membership alone disqualifies" (at p. 190). So here: as to the Communist Party, under the statute, the fact of membership alone

disqualifies.

Indeed, the case here is much the same as the oath provision in Garner. There, too, there was a statutory requirement (city charter) that members of the proscribed organizations be ineligible for public employment. There, like here, the employees were asked to state, albeit by oath, that they were not members of such organizations. This requirement was sustained by this Court only when the information sought was understood to include scienter on the part of the employee. As was made amply clear in Garner and underlined in Wieman, absent the requirement of scienter this sought after "information" was beyond the power of the state to demand.

II

CALIFORNIA GOVERNMENT CODE 1028.1 AS CONSTRUED AND APPLIED VIOLATES THE FREEDOM OF SPEECH, RELIGION AND ASSEMBLY PROVISIONS OF THE FIRST AND THE FOURTEENTH AMENDMENTS

As pointed out above, petitioner acted because of a profound respect for, and out of a desire to, protect the speech, religion and assembly rights guaranteed by the First Amendment and a belief that these constitutional guarantees prohibited the inquiries put to him.

We believe this Court's opinion in Wieman rests inherently on those freedoms (344 U.S. at 191). We believe, likewise, that the concurring opinions in the case are posited on the same base. (344 U.S. at 193 and 194, 195).

III

THE PETITIONER SHOULD BE GIVEN AN OPPORTUNITY TO ANSWER NOW

If this Court is of the view, either prior to the grant of

certiorari, or after such grant, that the statute, as enforced here, squares with the Constitution of the United States, and that the constitutional rights of the petitioner have not been abridged, the petitioner nonetheless asks for the following relief:

That this Court, by appropriate order, reverse the judgment below and remand the cause to the California courts, with direction to permit the petitioner to appear before the Board below, and to be permitted to answer, at such appearance, the unanswered question. The petitioner will then appear before the Board and will answer the questions.[13/]

In this request, he asks no more than this Court granted the petitioners in Garner. There (at p. 724) after upholding the requirement of an oath upon the petitioners, as well as the requirement of an affidavit as to membership in certain organizations, including past or present membership in the Communist party, (see p. 719) this Court, in effect, required the City of Los Angeles to give the petitioners there "an opportunity to take it (the oath) as interpreted and resume employment". Later in Wieman, this Court (at p. 189) took occasion to note the opportunity accorded the petitioners in Garner, to resume their employment upon compliance with the requirement there.

The precedent established in Garner, should be followed here, for the following reasons:

1. In his appearance before the Board the petitioner made it clear that his refusal to answer was posited "in principle" (Am. Pet., Exh. A, 34); and in the belief that the courts would hold the legislation, as enforced, unconstitutional.[14/] He said (Ibid) "I oppose that (the legislation as enforced) in principle and shall

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13/ He will answer them with a categorical "No".

14/ Cf. Justice Carter's even greater confidence as to what this Court will do. "I am confident that the Supreme Court of the United States will reverse the state court decision in the Slochower case. I feel even more strongly that the Supreme Court of the United States should reverse the erroneous decision of the majority of the court in the present case." (Diss. Op. 22).

continue to oppose it, if necessary, until the Supreme Court passes upon it."

For only by taking the stand that he did could the petitioner, for himself and for the many others that may follow, afford a medium for the challenge, of what he deemed to be a state enactment that was the product of the current cold war and the hot emotions it engenders[15] -- particularly when fanned through legislative halls. In his resistance to the statute, believed by him to be unconstitutional -- until upheld by this Court -- the petitioner attempted to resist the current "caution and timidity",[16] that besets teachers throughout the land, and particularly in California. The stand he took was in accord with the views of Mr. Justice Brandeis "that the greatest menace to freedom is an inert people;[17] and he determined, in his conscience, that such inertia ill-befitted an American whose ancestors founded a free nation (Am. Pet., Exh. A, 34).[18]

2. Dismissal of the petitioner is not only to visit upon him a "deep stain";[19] but to deprive him permanently from earning a livelihood. For upholding his dismissal, without affording him an opportunity now to comply with the requirement of the Board and of the statute, means the end of his career as a teacher in any public school system anywhere in the country.

By making him the first person in California to be brought up for hearing under the Luckel Act, the State of California has made of him a "guinea pig" to test the constitutionality of the Luckel Act; no harm will come to California or the Nation, if the "guinea

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15/ Cf. Wieman at p. 191.

16/ Cf. Justice Frankfurter in Wieman at p. 191.

17/ Whitney v. California, 273 U.S. 356, 375.

18/ Cf. Keegan v. United States, 325 U.S. 478, 493, (followed in Okamoto v. United States, 152 F. 2d 905), encouraging, in effect, resistance to an Act of Congress deemed by them to violate the Constitution.

19/ Justice Clark in Wieman at p. 19.

pig" is permitted to survive the test -- by resuming his employment, upon answering the questions now.

To put it differently: the petitioner, as a teacher, is willing to be (as he hopes he has been until now) a "priest of our democracy";[20] he has no desire to join the Order of the Penitentes.

C O N C L U S I O N

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. L. WIRIN

FRED OKRAND

Attorneys for Petitioner.

20/ Justice Frankfurter, in Wieman, at p. 196

APPENDIX A

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by HARRY C. STEINMETZ From dismissal	Case No. 1379 DECISION

WHEREAS, the State Personnel Board has considered carefully the proposed findings of fact and decision of the Hearing Officer filed on the 26th day of February, 1954, in the matter of the appeal by Harry C. Steinmetz from dismissal from the position of Associate Professor of Psychology at the San Diego State College of the Department of Education by Roy E. Simpson, Director of Education, Case No. 1379; and

WHEREAS, by said proposed decision the action dismissing Harry C. Steinmetz from his said position is affirmed without modification; it is hereby

RESOLVED, That the proposed findings of fact and decision of the Hearing Officer in said matter are hereby adopted by the State Personnel Board as its decision in the case.

* * * * * * * * *

I hereby certify that on the 26th day of February, 1954, the State Personnel Board made and adopted the foregoing resolution, and I further certify that the attached copy of the Hearing Officer's proposed decision is a true copy of the decision in Case No. 1379 adopted by the State Personnel Board in said matter.

DATED: March 1, 1954.

JOHN F. FISHER
John F. Fisher, Executive Officer,
State Personnel Board.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

HARRY C. STEINMETZ

From dismissal from the position of Associate Professor of Psychology at the San Diego State College of the Department of Education by Roy E. Simpson, Director of Education

Case No. 1379

PROPOSED DECISION

This matter came on for hearing before Bion R. Gregory, Hearing Officer of the State Personnel Board, at the hour of 10:00 a.m., February 23, 1954, at Sacramento, California. The appellant, Mr. Harry C. Steinmetz, was not personally present but was represented by Mr. Fred Okrand of the firm of Wirin, Rissman & Okrand, Attorneys at Law. The respondent, Mr. Roy E. Simpson, Director of Education, was not personally present but was represented by the Hon. Edmund G. Brown, Attorney General, by Mr. Richard L. Mayers, Deputy Attorney General. Evidence having been adduced and duly considered, the Hearing Officer makes the following findings of fact and decision:

I

That Roy E. Simpson, Director of Education, has been, and was during the time herein material, and now is, the duly appointed, qualified and acting Director of the Department of Education and as such is the appointing authority of Harry C. Steinmetz, the employee herein.

II

That the State Board of Education is the governing body of the San Diego State College of the Department of Education.

III

That on February 4, 1954, there was served on Harry C. Steinmetz a written notice of dismissal; that on February 10, 1954, a copy of said notice was filed with the State Personnel Board;

that said notice informed Harry C. Steinmetz that he was dismissed from his exempt position as Associate Professor of Psychology at the San Diego State College of the Department of Education effective at the close of business on February 5, 1954; that said notice contained a statement of the causes for his dismissal as: failure and refusal to perform the normal and reasonable duties of his position within the meaning of Section 20396(e) of the Education Code, and that he failed and refused to answer questions propounded to him by the governing body of the San Diego State College pursuant to Government Code Section 1028.1; that the State Board of Education adopted the following resolution:

> "RESOLVED, That the state Board of Education finds that at the special meeting of the Board held on January 28, 1954, Dr. Harry C. Steinmetz, having been ordered pursuant to Government Code Section 1028.1 to appear and answer questions propounded to him pursuant to Government Code Section 1028.1, refused to answer the following questions:
>
> "1. 'Are you now knowingly a member of the Communist Party?'
>
> "2. 'Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?'
>
> "The Board, therefore, recommends to the Director of Education that Dr. Harry C. Steinmetz be dismissed from his position as an associate professor at the San Deigo State College.";

that Harry C. Steinmetz was dismissed by Roy E. Simpson, Director of Education of the State of California, in accordance with Sections 20396 and 20396.1 of the Education Code by notice of his dismissal in writing signed by the said Roy E. Simpson and served on the said Harry C. Steinmetz; that said notice of dismissal set forth a statement of the causes, the events and transactions upon which the causes were based, the nature of the penalty and the effective date, and a statement of the employee's right to answer within thirty days and request a hearing before the State Personnel Board; that on February 11, 1954, Harry C. Steinmetz filed in writing with

the State Personnel Board a request for hearing on his said dismissal as provided in Section 20396.2 of the Education Code.

IV

That Harry C. Steinmetz was appointed to the position of Assistant Professor at the San Diego State College of the Department of Education on July 1, 1932, and on July 1, 1933, was employed at said San Diego State College as an Assistant Professor of Psychology; that on July 1, 1936, he was employed as an Associate Professor of Psychology and continued in said employment except for a period of military leave from July 1, 1941, to July 1, 1942; that effective at the close of business February 5, 1954, Harry C. Steinmetz was, ever since that date has been, and is now dismissed from duty from said position.

V

That the said Harry C. Steinmetz was ordered by the governing body of the San Diego State College to appear before it on January 28, 1954, to answer under oath questions propounded by such governing body pursuant to Section 1028.1 of the Government Code; that Harry C. Steinmetz did appear before said governing body on January 28, 1954, and was asked the following questions which he refused to answer:

"Are you knowingly a member of the Communist Party?

"Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?"

VI

That said failure to answer the questions set forth in Paragraph V hereof is ground for dismissal under Section 20396(e) of the Education Code and Section 1028.1 of the Government Code; that the penalty is not excessive, unreasonable or discriminatory; that said Harry C. Steinmetz did do the acts and omissions alleged as the events and transactions upon which the causes are based; that the acts and omissions alleged as the events and transactions upon

which the causes are based were not justified; that the required procedure for his said dismissal was followed; that by reason of said acts and omissions the said Harry C. Steinmetz is guilty of failure and refusal to perform the normal and reasonable duties of his position within the meaning of Section 20396(e) of the Education Code and is guilty of insubordination, and guilty of violating Section 1028.1 of the Government Code.

VII

That the allegations of the answer and request for hearing filed with the State Personnel Board by the said Harry C. Steinmetz are not true except for such allegations thereof as are consistent with the allegations hereinabove found to be true.

VIII

That the causes, and each of them, for which the said dismissal was imposed and found to be true in Paragraphs V and VI hereof are sustained by the evidence; that each of said causes, separately and severally, so found to be sustained by the evidence is sufficient to support said dismissal.

* * * * * *

WHEREFORE, it is hereby determined that for the causes found to be true as set forth in Paragraphs V and VI of the foregoing findings of fact, and for each of said causes, separately and severally, the action taken by Roy E. Simpson, Director of Education, dismissing the said Harry C. Steinmetz from the position of Associate Professor of Psychology at the San Diego State College of the Department of Education is hereby affirmed without modification.

* * * * * *

I hereby certify that the foregoing constitutes my proposed decision in the above-entitled matter as the result of a hearing conducted by me on February 23, 1954, at Sacramento, California,

and I hereby recommend its adoption by the State Personnel Board as its decision in the case.

DATED: February 26, 1954.

BION R. GREGORY
Bion R. Gregory, Hearing Officer,
State Personnel Board.

APPENDIX B

Opinion of California District Court of Appeal

[Civ. No. 8586, Third Dist. June 22, 1954]

HARRY C. STEINMETZ, Petitioner, v. CALIFORNIA STATE BOARD OF EDUCATION et al., Respondents.

PROCEEDING in mandamus to compel reinstatement as a teacher. Writ denied.

Wirin, Rissman & Okrand, A. L. Wirin and Fred Okrand for Petitioner.

Edmund G. Brown, Attorney General, and Richard L. Mayers, Deputy Attorney General, for Respondents.

VAN DYKE, P. J.-- Petitioner was an Associate Professor of Psychology at San Diego State College. He asks this court for a writ of mandate directed to the California State Board of Education and others, commanding them to reinstate him in his position and make him whole for loss of salary upon the ground that the respondents have unlawfully discharged him. We issued an alternative writ of mandate and the matter is now before us for decision.

Purporting to act under the authority of article 3 of chapter 1 of division 1 of the Education Code and chapter 2 of division 10 of the Education Code and section 1028.1 of the Government Code, respondent board directed petitioner to appear before the board and its directors to answer questions relating to:

(a) Present personal advocacy of the forceful or violent overthrow of the government of the United States or of this state.

(b) Present knowing membership in any organization so advocating.

(c) Past knowing membership at any time since September 10, 1949, in any organization which to his knowledge and during his membership so advocated.

(d) Present knowing membership in the Communist Party or

past knowing membership in that party at any time since September 10, 1948. (Gov. Code, § 1028.1.)

Responsive to questions asked him, petitioner testified that for 18 years he had been Associate Professor of Psychology at San Diego State College; that he had no knowledge as to whether or not the Communist Party advocates the forceful or violent overthrow of the United States or of any state; that he had never belonged to, and would never so long as he was a state employee, belong to, an organization that advocated force and violence against the United States, this state or any subdivision thereof; that he had taken the Levering oath (Cal. Const., art. XX, § 3), had taken it honestly and that he then reaffirmed it in all of its parts and, specifically, that he did not advocate, never had advocated and never would advocate so long as he was publicly employed, the violent overthrow of government; that he had not at any time since September 10, 1948, knowingly been a member of the Communist Party when to his knowledge it advocated the violent or forceful overthrow of the government of the United States or of any state. When asked, "Are you now knowingly a member of the Communist Party?" he refused to answer. When asked, "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" he refused to answer. The examining board adopted a resolution recommending to the Director of Education that for these refusals petitioner be dismissed from his position. The director took such action. Petitioner applied to the State Personnel Board for a hearing, which body, after hearing, found that the failure to answer these questions was ground for dismissal under section 20396(e) of the Education Code and section 1028.1 of the Government Code and having so found affirmed petitioner's dismissal.

This cause presents questions as to the method, nature and extent of permissible inquiries touching the loyalty of government

employees, which questions for some 10 or more years have engaged the attention of courts throughout the country. The purpose of the subject legislation under which these proceedings were taken was to statutorily authorize the government and its agencies to inquire from time to time into such matters; and the Legislature, after adopting certain legislative findings, declared that it should be the duty of any employee who might be subpoenaed or ordered by the governing body of the state or of any local agency to appear before such governing body or agency to answer under oath questions relating to loyalty in the field of advocacy of, or membership in organizations that advocate, violent overthrow of government.

Petitioner's contentions are broader than the issues presented to us. It is to be noted that petitioner has not been separated from state service because he is or ever was a communist or a member of the Communist Party or because he is or ever was a member of any organization advocating violence against government or because he does so advocate or ever has so advocated. He was separated from service becuase he refused to answer two specific questions. Although in his arguments the petitioner makes broad attacks upon the subject legislation, we are not called upon to do more and we do no more than to determine whether or not his refusal to answer these two questions constituted cause for his dismissal. We are not concerned with and do not decide what would be proof of disloyalty in fact, sufficient for dismissal upon that ground.

(1) Government has the right to direct that its employees shall not belong to organizations which they know advocate the overthrow of the government by force or other unlawful means and such employees may be required to make sworn statements similar to the Levering oath as a condition to obtaining or continuing in public employment. (Pockman v. Leonard, 39 Cal.2d

676, 686 (249 P.2d 267).) (2) A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty. (3) The state, under its police power, may properly limit a person's freedom of choice in such organizations and employment in the school system. (Pockman v. Leonard, supra, citing Adler v. Board of Education of City of New York, 342 U.S. 485 (72 S.Ct. 380, 386, 96 L.Ed. 517, 27 A.L.R.2d 472).) (4) Government, in achieving its object of having in its employ no disloyal person, is not limited to requiring its employees to take loyalty oaths. It may also subject such employees at reasonable times and places and upon reasonable notice to direct inquiry, under oath, and require that they then answer questions relevant to such matters.

We see no substantial difference in requiring sworn affidavits as to membership or nonmembership in the Communist Party and in requiring sworn statements at a hearing. And as to the right of government to require the former, the Supreme Court of the nation said in Garner v. Board of Public Works, 341 U.S. 716, 720 (71 S.Ct. 909, 95 L.Ed. 1317, 1322):

"The affidavit raises the issue of whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

(5) In such inquiry, since past conduct and loyalty bears a reasonable relationship to present fitness and trustworthi-

ness, information may be required regarding it. (Garner v. Board of Public Works, supra, 720; see also Pockman v. Leonard, supra, 687.) And the fact that divulging past or present membership in such organizations may under some circumstances amount to self-incrimination does not divest the power of government to require answer as a condition or qualification of employment. (Pockman v. Leonard, supra, 687, citing Christal v. Police Com., 33 Cal.App. 2d 564 (92 P.2d 416).) (6) It is the duty of an employee to answer questions of the employer touching occurrences in employment affecting the subject thereof and to answer questions touching fitness of the employee to remain in service; and a violation of that duty with or without a specific statutory declaration would constitute cause for dismissal upon grounds of insubordination and conduct unbecoming such employment. (Christal v. Police Com., supra, p. 568.) (7) We think the Legislature was acting wholly within its well-recognized powers when it enacted section 1028.1 whereunder it specifically authorized the respondents to order petitioner to appear and to answer questions relating to the subject matter set forth in said section.

The Legislature in said section has not attempted to word the questions that may be asked. It has declared as to each subject mentioned therein that questions relevant thereto may be asked and must be answered. Thus, while inquiring as to present personal advocacy by an employee of violent overthrow of government, any question fairly relevant to that subject may be asked. So with the other subjects of inquiry stated in the section; and many questions would be relevant to all alike. It would have been relevant, after petitioner had answered any question which he did answer to have asked this further question: "Are you a member of the Communist Party?" or this question: "Have you at any time since September 10, 1948, been a member of the Communist Party?" (8) We hold further that in this inquiry

these specific questions could have been asked without asking the others, for if, as has been held, government may inquire of its employees touching their loyalty to it then government may ask any questions relative to that inquiry and the question as to membership, past or present, in the Communist Party is relevant to such inquiry. It is well known that there is a Communist Party in this country and that it purposely has acted and does act subversively; that it and its purposes have been the subject of legislative findings by the Congress, and by the Legislatures of many of the states, as well as of this state; and that, based upon such findings, Congress and the Legislatures of the various states have enacted legislation in recognition not only of the existence of the party in this country, but also of its unlawful and subversive activities and purposes. So in promulgating the National Labor Relations Act, Congress made detailed findings upon the matter of that party's existence. In American Communications Assn. C.I.O. v. Douds, 339 U.S. 382 (70 S.Ct. 674, 94 L.Ed. 925), the Supreme Court upheld those provisions of the act which required the officers of a union, seeking to utilize the opportunities afforded by the act, to file an affidavit with the board that they were not members of the Communist Party or affiliated therewith and that they did not believe in and were not members or supporters of any organization that believed in or taught the overthrow of government by force. Commenting upon the nature of that party as revealed by the congressional findings, Mr. Justice Jackson in a concurring opinion stated that from information before it and from facts of general knowledge Congress could rationally conclude that behind its political party facade the Communist Party was a conspiratorial and revolutionary junta organized to reach ends and to use methods incompatible with our constitutional system; that its goal was to seize power of government by and for a minority rather than to acquire power through

the vote of a free electorate; that it alone among American parties is dominated and controlled by a foreign government; that violent and undemocratic means are the methods used to attain its goal; and that every member of it is an agent to execute the communist program. It is not, rightly speaking, a political party. (Pockman v. Leonard, supra, p. 686.) While enacting the subject legislation here our Legislature made similar findings. In addition to all of this, many trials have been held in the courts of this nation wherein the existence and the subversive purposes and activities of the Communist Party have been put directly in issue. The triers of fact in those trials have frequently held that the party does exist in this country and that its purposes and activities are subversive; and these findings have been upheld by the highest courts in the states, and by the Supreme Court of the United States, as having been abundantly supported by the evidence introduced. It is, therefore, proper to say that in an inquiry touching the loyalty of public employees to the government by whom they are employed, with particular reference to whether or not they belong to subversive organizations or advocate their unlawful purposes, they may be asked and required to answer as to whether or not they belong to the Communist Party. Such a question is relevant to the inquiry and the employee is required to answer upon pain of separation from government service for refusal. And in this aspect it is immaterial whether or not the question is limited to membership with knowledge of the party's subversive purposes. It has been held that separation from service cannot be predicated upon innocent membership, that is, membership without knowledge of such unlawful purposes and activities. But we are not now discussing, nor are we required here to discuss, the limitations that must be imposed upon separation from service lest the innocent be discharged as well as the guilty. We are concerned here only with the relevancy to the subject of inquiry

of the question: "Are you a member of the Communist Party?" It is relevant to inquire as to membership in the Communist Party without attaching to that question any qualifications whatever. If the answer be that the questionee is not a member of the Communist Party and that answer is by the inquirer accepted as true, further inquiry could be dropped. If the inquirer suspects the good faith of that answer, further questions could properly be asked to develop its truth or falsity. If the questionee answers that he is a member, then further inquiry would be relevant touching the question of whether his membership was innocent or guilty. And if it be that only guilty membership will sustain expulsion from service it nevertheless remains true that the inquirer, in order to develop the inquiry in orderly manner, may ask flatly whether or not the questionee is or has been a member of the Communist Party.

(9) The questions which the petitioner refused to answer were couched in the language of the legislation, that is, petitioner was asked as to present knowing membership in the Communist Party and as to past knowing membership therein. We have said that the question could have been directed to membership, whether guilty or innocent, knowledgeable or otherwise, and of course that means that the question could also be asked in the form in which it was asked. The Legislature was not concerned, nor are we, with the wording of the questions. It and this court were and are concerned only with the relevancy of those questions. The questions as asked in this proceeding were relevant to the inquiry and it was the duty of the petitioner to answer them. This he refused to do and his separation from the service was, therefore, justified.

In all essentials the proceedings here were like those under attack in Adler v. Wilson, decided by the Appellate Division of the Supreme Court of New York, reported in 282 App. Div. 418

(123 N.Y.S.2d 655, 657-658):

"The basic question before us is as to the right of the Board or the Superintendent of Schools to question teachers as to their Communist Party membership, past or present, and their obligation to answer. None of the petitioners admits membership in the Communist Party, nor is the latter a party to this proceeding and appeal. The question here posed was answered in Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317.

. . . . . .

"The Garner case remains conclusive as to the Board's right of inquiry concerning a teacher's membership in the Communist Party, as well as his obligation to answer.....In a concurring opinion Mr. Justice Frankfurter said, 341 U.S. 716, 725, 71 S.Ct. 909, 915, 95 L.Ed. at page 1325: 'A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government.'"

Petitioner further contends that he substantially complied with section 1028.1 of the Government Code by the answers he did give to other questions asked of him. We think it apparent from what has been said that this contention cannot be sustained. Petitioner says that by his answers which were heretofore delineated he did substantially answer the questions: "Are you now knowingly a member of the Communist Party?" If the petitioner believes that contention to be sound we cannot understand why he did not

make direct answers to the specific questions asked. Petitioner's questioners were not required to submit to quibbling. They were entitled to have a direct and unconditional answer to the specific questions as to his past or present membership in the Communist Party. His refusal to so answer was a violation of his duty, an act of insubordination and justified his discharge.

The alternative writ heretofore issued is discharged and the peremptory writ is denied.

Peek, J., and Schottky, J., concurred.

APPENDIX C

OPINION OF CALIFORNIA SUPREME COURT

(Sac. No. 6530. In Bank. July 5, 1955)

HARRY C. STEINMETZ, Petitioner, v. CALIFORNIA STATE BOARD OF EDUCATION et al., Respondents.

(On hearing after decision by the District Court of Appeal, Third Appellate District, Civ. No. 8586 (126 A.C.A. 192, 271 P.2d 614) denying writ of mandate. Writ denied.)

PROCEEDING in mandamus to compel petitioner's reinstatement as associate professor at a state college. Writ denied.

Wirin, Rissman & Okrand, A. L. Wirin and Fred Okrand for Petitioner.

Edmund G. Brown, Attorney General, and Richard L. Mayers, Deputy Attorney General, for Respondents.

GIBSON, C. J. -- Petitioner was dismissed from his position as an associate professor at San Diego State College because of his refusal, at a hearing before the State Board of Education, to answer two questions as to whether he was or had been a member of the Communist Party, and he seeks a writ of mandate to compel his reinstatement.

The state board acted pursuant to section 1028.1 of the Government Code, which is part of a statute commonly known as the Luckel Act. Section 1028.1 provides that it shall be the duty of any public employee, when ordered to do so, to appear before the governing body of the state or local agency by which he is employed and to answer under oath questions relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

"(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948."

The section further provides that "Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

At the hearing petitioner was examined by William Blair, president of the State Board of Education, as follows:

"MR. BLAIR:....Are you knowingly a member of the Communist Party?

"DR. STEINMETZ: Mr. Chairman. I am sorry, but I find it necessary to refuse to answer this question as I would if you asked me if I were a member of any other party because I do not believe that there is authority in the act under which you are proceeding for asking such a question.

"MR. BLAIR:....Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?

"DR. STEINMETZ: In all good conscience I must give you exactly the same answer now that I gave you a moment ago, sir.

"MR. BLAIR: That is, that you decline to answer.

"DR. STEINMETZ: Yes, sir.

"MR. BLAIR: .....Do you know whether or not the Communist Party advocates the forceful or violent overthrow of the government of the United States or of any state?

. . . . . .

"DR. STEINMETZ: Mr. Blair, I have no such knowledge.

. . . . . .

"MR. BLAIR: Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to your knowledge, it advocated the forceful or violent overthrow of the government of the United States or of any state?

"DR. STEINMETZ: Mr. Blair. I have in part answered this question when I disclaimed knowledge. I should like further to answer it by saying that I have never in my life, now, in the past, and so long as I would be a state employee, would never belong to an organization that advocated force and violence against the United States, this state, or any subdivision thereof. I took an oath, the Levering Act oath, and signed it honestly,.... (Here petitioner recited in substance, the Levering oath, Gov. Code, § 3103.)

"MR. BLAIR: That was intended to be an answer to the question 'Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when to your knowledge it advocated the forceful or violent overthrow of the government of the United States or of any state?' What would be your answer directly to that question, Dr. Steinmetz?

"DR. STEINMETZ: Mr. Blair, in part I answered that when I disclaimed knowledge, and in further part I have just answered it by reaffirming the Levering Act oath.

"MR. BLAIR: I have repeated the question and I would feel obliged to direct you to answer it 'yes' or 'no' or 'I refuse to answer'. After that you may explain your answer, if you have not already explained it.

. . . . . .

"DR. STEINMETZ: May I say that I have answered a

question with regard to membership, and that was very straightforward, and I have answered a question with regard to knowledge by disclaiming that I had the knowledge, and I have answered a question with regard to advocacy with an emphatic "No".

"MR. BLAIR: Your 'no' applies to what part of the question?

"DR. STEINMETZ: To my advocacy, and to my knowledge, and to membership with knowledge.

"MR. BLAIR: These questions were all framed in the belief that they could be in all fairness answered 'yes' or 'no'.

"DR. STEINMETZ: You consider a question like that fair, Mr. Blair?

"MR. BLAIR: It seems that it simply wishes to inquire whether you have knowingly been a member of the Communist Party when to your knowledge it advocated the forceful and violent overthrow of the government. Now can you answer that by--you can answer that by 'yes' or 'no' or by refusal to answer it. If you take objection to the form of it you can refuse to answer.

"DR. STEINMETZ: Under protest in principle on account of my belief with my attorney that this is a duplicitous question, pressed as I feel I am, I answer it then 'no'.

"MR. BLAIR: .....Do you presently advocate the forceful or violent overthrow of the government of the United States or of the government of any state of the United States?

"DR. STEINMETZ: Mr. Blair, as a teacher and a free American, I trust, who distinguishes between incitement and advocacy, I like no question pertaining to advocacy, but I have already answered it 'no', and therefore, of course, answer it the same way now.

"MR. BLAIR: ....Are you knowingly a member of any organization which to your knowledge now advocates the forceful or violent overthrow of the government of the United States or

of the government of any state of the United States?

"DR. STEINMETZ: No, sir.....

. . . . . .

"MR. BLAIR: Have you at any time since September 10, 1948, knowingly been a member of any organization which to your then knowledge advocated during the time of your membership the forceful or violent overthrow of the government of the United States or of the government of any state of the United States?

. . . . . .

"DR. STEINMETZ: ....I should like to answer the last question with a very decided 'no'...."

The foregoing shows that, although petitioner answered questions asked under subdivisions (a), (b) and (c) of section 1028.1 relating to his personal advocacy of violent overthrow of the government and his membership in organizations advocating violent overthrow of the government, he refused to answer two questions asked under subdivision (d), namely, (1) "Are you knowingly a member of the Communist Party?" and (2) "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" His discharge was based upon his refusal.

Petitioner argues that, in effect, he answered the questions as to whether he was knowingly a member of the Communist Party when, at a later point in the examination, he replied to the inquiry as to knowing membership in the party with knowledge of its objectives. However, he refused to answer inquiries which omitted the qualification of knowledge of the nature of the organization and were directed only to knowledge of membership. The word "knowingly" as used in the questions which he declined to answer did not refer to knowledge of the aims of the party but merely to whether he knew that he was a member, and it is clear from the record that he so understood the word at the time he refused to answer. In a memorandum submitted to the board

at the beginning of the hearing, petitioner stated, "The use of the phrase 'knowing membership in the Communist Party' does not vitiate the vice of the statute. This is so because the Legislature has made it clear that the 'knowing' refers to knowing one is a member of the Party rather than as to the knowledge of the one being questioned as to the subversive nature of the Party....In other words, the statute plainly states that knowledge of the improper nature of the Communist Party is not an ingredient." Petitioner also showed that he so understood the questions when he said, "I have answered a question with regard to membership by saying that I would not answer any question with regard to membership....and I answered a question with regard to knowledge by disclaiming that I had the knowledge...."

(1) Section 1028.1, considered as a whole, shows on its face that the Legislature, in using the words "knowing membership," was referring to a person's knowledge of his membership, rather than to his knowledge of the character of the organization. In subdivision (c), when the Legislature intended to specify knowledge of the nature of the organization, as well as knowledge of the fact of membership, it explicitly referred to "knowing membership" in an organization which "to the knowledge of such employee... advocated" violent overthrow of the government. In the next subdivision, on the other hand, when the Legislature spoke of "knowing membership" without memtion of knowledge of advocacy, it obviously was referring only to the fact of membership and not to knowledge of the nature of the organization. The choice of language was clearly deliberate, and in both subdivisions the words "knowing membership" were used in the same sense of knowledge of the fact of membership. (2) It thus was proper, under the terms of subdivision (d), to question petitioner as to the fact of membership without reference to his knowledge of the character of the organization, and the questions on this point which he

refused to answer were not covered by his denials that he was knowingly a member with knowledge of the nature of the party.

(3) The statute under which petitioner was dismissed is not rendered invalid by the fact that it requires an employee to answer questions as to his membership in the Communist Party without regard to his knowledge of the nature of the party. Petitioner's discharge was not because of membership in a proscribed organization but because of his refusal to answer questions as to whether or not he held membership in the Communist Party. (4) A governmental body may, of course, make reasonable inquiries into matters pertaining to the fitness of its employees. (5) Loyalty on the part of those in public employment is important to orderly and dependable government and is, therefore, relevant to fitness for such employment. (Pockman v. Leonard, 39 Cal.2d 676, 687 (249 P.2d 267).) (6) An employee's associates, as well as his conduct, are factors which may be considered by a state agency in determining his loyalty, and information on that subject may properly be elicited from him. (Adler v. Board of Education, 342 U.S. 485, 492-493 (72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R. 472); Pockman v. Leonard, 39 Cal. 2d 676, 685-687 (249 P.2d 267.)[1] In this connection, it has been held that a public employer may constitutionally require its employees to disclose any past or present membership in the Communist Party. (Garner v. Board of Public Works, 341 U.S. 716, 720 (71 S.Ct. 909, 95 L.Ed. 1317).)[2]

1/ In the Adler case it was said: "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

2/ In the Garner case, after stating that the issue was whether a city "is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party", (cont.)

(7) Statutes, such as the one involved here, which compel disclosure of information concerning a public employee's membership in proscribed organizations, must be distinguished from those which provide for discharge or disqualification because of membership or refusal to take an oath denying membership. Under the latter type of statute, knowledge of the character of the organization has been held essential (Wieman v. Updegraff, 344 U.S. 183 (73 S.Ct. 215, 97 L.Ed. 216)), and the legislation has been sustained only when it expressly or impliedly required such knowledge (Adler v. Board of Education, 342 U.S. 485, 494 (72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R.2d 472); Garner v. Board of Public Works, 341 U.S. 716, 723-724 (71 S.Ct. 909, 95 L.Ed. 1317); Gerende v. Baltimore City Board of Supervisors of Elections, 341 U.S. 56, 57 (71 S.Ct. 565, 95 L.Ed. 745); Pockman v. Leonard, 39 Cal. 2d 676, 685 (249 P.2d 267); Hirschman v. County of Los Angeles, 39 Cal.2d 698, 702 (249 P.2d 287, 250 P.2d 145).) (8) On the other hand, where the statutes provide merely for the disclosure of information, a requirement that the employee have knowledge of the nature of the organizations is not necessary. (See Garner v. Board of Public Works, 341 U.S. 716, 719-720 (71 S.Ct. 909, 95 L.Ed. 1317); Adler v. Board of Education, 342 U.S. 485, 492-493 (72 S.Ct. 380, 27 A.L.R.2d 472).)

(9) Petitioner's refusal to answer was not based upon a claim of privilege against self-incrimination under the Fifth Amendment to the federal Constitution or section 13 of article I of the state Constitution, and, accordingly, he is precluded from

2/(cont.) it was said: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

relying on these constitutional provisions. (10) It is settled that a witness is required to claim this privilege, that it is a purely personal privilege, solely for the benefit of the witness and that it is deemed waived unless invoked. (Rogers v. United States, 340 U.S. 367, 370-371 (71 S.Ct. 438, 95 L.Ed. 344, 19 A.L.R.2d 378).) (11) Moreover, a person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under some circumstances, may amount to self-incrimination. (Pockman v. Leonard, 39 Cal.2d 676, 687 (249 P.2d 267); Christal v. Police Com., 33 Cal. App. 2d 564, 567 et seq. (92 P.2d 416); cf. Garner v. Board of Public Works, 341 U.S. 716, 719-720 (71 S.Ct. 909, 95 L.Ed. 1317); Adler v. Board of Education, 342 U.S. 485, 492-493 (72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R.2d 472).) (12) A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment.

(13) Section 1028.1 does not violate the provision of the California Constitution which prohibits the passage of special laws in certain enumerated cases and "in all other cases where a general law can be made applicable." (See Cal. Const., art. IV, § 25, subds. 1-33.) This section does not fall within any of the enumerated categories, and, insofar as any of its provisions are specific, no general law could have been made applicable. (14) The Legislature, desiring to authorize inquiry as to membership in the Communist Party, could do so only by naming it. The designation of that organization was not arbitrary, but was reasonably related to the purpose of the legislation, since, as we have seen, information as to membership in the party is pertinent to fitness for public employment. The case of Communist Party v. Peek, 20 Cal. 2d 536 (127 P.2d 889), is readily distinguishable.

The statute there held invalid denied the Communist Party a place on the ballot, and regulation of elections is listed in the Constitution as one of the areas where a special law is prohibited. (Cal. Const., art. IV, § 25, subd. 11.) The basis of the decision in that case was that, in the absence of evidence, the court would be required to take judicial notice of the subversive character of the Communist Party in order to uphold the statute as reasonable and that judicial notice to that effect could not be taken under the conditions then existing.

We need not determine whether there is any merit in petitioner's attack upon another section of the Luckel Act which provides that it shall be sufficient cause for dismissal when a public employee advocates, or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates, the overthrow of the government by force or violence. (Gov. Code, § 1028.) As we have seen, petitioner was not dismissed because of membership in any organization but because of his refusal to answer questions concerning matters which were relevant to his fitness for public employment.

The writ is denied.

Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence J., concurred.

CARTER, J.--I dissent.

It is my considered opinion that section 1028.1 of the Government Code of California is unconstitutional because it denies to public employees the fundamental rights and liberties guaranteed to them by the Fifth Amendment to the Constitution of the United States and article I, section 13, of the Constitution of California. Even if one should be so caught up in the hysteria of our times that he fails to perceive the intrinsic unconstitutionality of this statute, he still must recognize the fact that

the decision of the majority of this court in this case is erroneous under the rules announced in many recent cases decided by this court and by the Supreme Court of the United States.

In my opinion Dr. Steinmetz was wrongfully discharged and is therefore entitled to be reinstated. This conclusion may be reached by either of two lines of reasoning: (1) That Dr. Steinmetz answered all of the questions asked of him by the board, and therefore did not violate the provisions of Government Code, section 1028.1; or, (2) that Dr. Steinmetz refused to answer two of the questions put to him, but the board had no authority to ask those questions because the statute under which they acted was unconstitutional. (Wieman v. Updegraff, 344 U.S. 183 (73 S.Ct. 215, 97 L.Ed. 216); Pockman v. Leonard, 39 Cal.2d 676 (249 P.2d 267); Hirschman v. County of Los Angeles, 39 Cal. 2d 698 (249 P.2d 287, 250 P.2d 145).)

The arguments opposed to the majority decision in this case are like a Roman gladiator's trident. The central point is that the statute is an abridgement of the constitutionally guaranteed privilege not to testify against oneself. The two auxiliary points are: (1) That there was no violation of the statute, or (2) that the statute is an arbitrary deprivation of due process, and is, therefore, unconstitutional under the holding in the Wieman, Pockman and Hirschman cases. In reaching its erroneous conclusion the majority has necessarily impaled itself on one or more of these points.

The first contention made by Dr. Steinmetz in his petition for a writ of mandate is that he did not violate Government Code, section 1028.1, and that his discharge for an alleged violation of that section was therefore unlawful. No contention is made that Dr. Steinmetz refused to answer any of the questions put to him except these two:

(1) "Are you knowingly a member of the Communist Party?"

(2) "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?"

The record shows that Dr. Steinmetz answered, "No" when asked: "Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to your knowledge, it advocated the forceful or violent overthrow of the Government of the United States?"

Dr. Steinmetz contends that the answer to this question constituted an answer to the two former questions.

It is clear either that the answer to the latter question did constitute an answer to the former questions, and that the majority opinion is incorrect in upholding his discharge; or that the State Board of Education had no authority to ask the two former questions because the statute authorizing those questions is unconstitutional. (Wieman v. Updegraff, supra, 344 U.S. 183; Pockman v. Leonard, supra, 39 Cal. 2d 676; Hirschman v. County of Los Angeles, supra, 39 Cal.2d 698.)

The controversy centers around the meaning of the word "knowingly" as used in the statute and as used in the questions asked of Dr. Steinmetz. The majority opinion states that the word "knowingly," as used in the questions which Dr. Steinmetz purportedly refused to answer, "....did not refer to knowledge of the aims of the party but merely to whether he knew that he was a member....."

Dr. Steinmetz contends that the word "knowingly" referred to knowledge of the pernicious nature of the Communist Party, and that he did, finally, answer (in the negative) the question as to membership in the party with knowledge of its nature.

In Wieman v. Updegraff, supra, 344 U.S. 183, the Supreme Court of the United States, by a unanimous decision, held that the due process clause of the Constitution of the United

States was violated by inquiries as to the membership of state employees in certain organizations, unless such inquiries referred to membership with knowledge of the activities and purposes of the organizations to which the employees belonged. Classification of innocent membership with knowing membership was held to be arbitrary, unreasonable and unconstitutional.

Conversely, the United States Supreme Court has held (though not unanimously) that inquiry as to membership of an employee in the Communist Party, or in named subversive organizations, is permissible where expressly or assumedly the inquiry is as to membership with knowledge of the nature and purpose of the organization. (Gerende v. Baltimore City Board of Supervisors of Elections, 341 U.S. 56 (71 S.Ct. 565, 95 L.Ed. 745); Garner v. Board of Public Works, 341 U.S. 716 (71 S.Ct. 909, 95 L.Ed. 1317); Adler v. Board of Education, 342 U.S. 485 (72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R. 2d 472).)

In ruling on the constitutionality of California's Levering Act loyalty oath (Gov. Code, §§ 3100-3109) this court stated: "It should be noted at the outset that the oath provisions relating to membership can reasonably be construed as referring only to affiliation with organizations known by the employee to belong to the proscribed class, and each clause of the oath must be interpreted as requiring knowledge of the character of any group as to which a declaration is required." (Pockman v. Leonard, supra, 39 Cal.2d 676, 685.)

In Hirschman v. County of Los Angeles, supra, 39 Cal. 2d 698, this court held that county employees could be required to disclose membership only in those organizations "which they knew advocated overthrow of the government by force, or which to their knowledge had been held by a court to advocate such action."

The Wieman, Gerende, Garner, Adler, Pockman and Hirschman

cases were all decided and published before the passage by the California Legislature of the Luckel Act (in which is included Government Code, section 1028.1). The Legislature must be assumed to have had those cases before it, and to have considered them in drafting Government Code, section 1028.1. The word "knowing" as used in the statute, clearly must have been intended to mean "with knowledge of the nature and purposes of the Communist Party." If the word did bear this connotation, then Dr. Steinmetz clearly answered the disputed questions in the negative when he stated that he had not "....at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to (his) knowledge, it advocated the forceful or violent overthrow of the government of the United States or of any state." It follows that the majority opinion, holding that Dr. Steinmetz did not answer the two questions, is erroneous.

If the word "knowing" as used in the statute and in the questions asked of Dr. Steinmetz, and as construed by the majority opinion in this case, meant only "with knowledge that he was a member," then (1) the statute is clearly unconstitutional (Wieman v. Updegraff, supra, 344 U.S. 183; Pockman v. Leonard, supra, 39 Cal .2d 676; Hirschman v. County of Los Angeles, supra, 39 Cal. 2d 698); (2) the State Board of Education had no authority to ask the questions; (3) Dr. Steinmetz was perfectly within his constitutional rights in refusing to answer the questions; and (4) the discharge of Dr. Steinmetz was wrongful.

The majority opinion concedes that knowledge of the character of the organization is essential in statutes "...which provide for discharge or disqualification because of membership or refusal to take an oath denying membership." Unlike the majority, I can find no substantial distinction between those statutes and the statute here considered. For refusal under oath to deny membership, the victim must be discharged under the terms

of Government Code, section 1028.1. If he does answer, and his answers indicate membership in a proscribed organization, he may be discharged under the terms of the companion section, 1028.

My position on the right of the state to inquire into the private affairs of its citizens was made clear by my dissenting opinions in Pockman v. Leonard, supra, 39 Cal.2d 676; Hirschman v. County of Los Angeles, supra, 39 Cal.2d 698; Tolman v. Underhill, 39 Cal.2d 708 (249 P.2d 280); Bowen v. County of Los Angeles, 39 Cal.2d 714 (249 P.2d 285); and Fraser v. University of California, 39 Cal.2d 717 (249 P.2d 283). I did not, at that time, believe that those cases were properly decided. I still believe that they are wrong. But right or wrong, those cases at least recognized a limit beyond which governmental inquiry into a citizen's associations and beliefs would be unreasonable. I believe that the limit set by that line of cases encroached on basic constitutional rights of the citizenry. The majority opinion in this case disregards even that limit, and broadens the trespass into constitutionally protected territory.

In the adoption of this statute, as well as the loyalty oath statute, I have no doubt as to the good intentions of the Legislature, "...and I do not consider it the function of the judicial branch of the government to pass upon the wisdom of such proposals. The...question before the courts is whether the enactments contravene some provision of the fundamental law--the Constitution. This is true even though a very grave question of public policy may be involved. It is for the Legislature and not the courts to declare the public policy of the state, providing such declaration is not in conflict with the Constitution." (Emphasis added; Pockman v. Leonard, 39 Cal.2d 676, 690 (249 P.2d 267), dissenting opinion.) Government Code, section 1028.1, meets an even broader constitutional objection than did the loyalty oath statute considered in the Pockman case. Without passing upon the

wisdom of the public policy behind Government Code, section 1028.1, I believe that this section is clearly a legislative abridgement of the provisions of the Fifth Amendment to the Constitution of the United States and of article I, section 13, of the Constitution of California. The section makes of the public employee a second-class citizen by denying to him, under penalty of exclusion from his means of livelihood, the right to refuse to answer questions which might tend to incriminate him--a right guaranteed to every citizen by the Constitutions of the United States and of California.

In the arguments before this court counsel for Dr. Steinmetz did not emphasize the privilege against self-incrimination. I believe, however, that the Fifth Amendment argument is implicit in this case. Even though Dr. Steinmetz's answers would not have been directly incriminating, he was entitled to rely on the protection of the Fifth Amendment, and its California counterpart, "...to avoid a trap for perjury set by those with sufficient influence to have him summoned....." That he did invoke that privilege at the hearing, is clearly shown in the portion of his testimony which is quoted later in this opinion.

The Fifth Amendment to the Constitution of the United States provides in part that "No person....shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...." This amendment was adopted in 1791. In California, at the present time, our Constitution provides (art. I, § 13) in part that "No person shall....be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law;....."

The proper application of these constitutional provisions to a modern legislative enactment can best be understood by viewing them in the background of their historical development. Beginning in about the year 1236 A.D. in England, there were

ecclesiastical courts which took upon themselves much of the burden of settling various disputes. It was the practice of these courts to submit persons called before them to an "oath ex officio." If the persons summoned to appear did not do so, they were excommunicated; if they did appear they were forced to give testimony, under oath, of not only the private sins of themselves, but of others. To lawyers schooled in the common law, a system which required a person to furnish his own indictment from his own lips under oath, was repugnant to the law of the land. About 1640, the accused began to claim, and the judges to concede, that a man on trial could not be compelled to answer questions which would disclose his guilt. However, the privilege was not absolute. When a prisoner was arraigned, he was required to identify himself by holding up his right hand or by expressly admitting that he was the person charged. Then he was asked how he would plead. If he refused to plead, the penalty depended upon the grade of the offense with which he was charged. If treason or a misdeanor, he was treated as if he had pleaded guilty; if a felony, he was confined to prison with a meager allowance of bread and water. Later, in addition to the bread and water diet, he was subjected to torture, which either killed him or induced him within a period of an hour or so, to plead either guilty or not guilty. This horrible and barbaric practice was not discontinued until 1772. At that time a statute was enacted which provided that if a person stood mute on his arraignment of piracy or felony, he would be convicted and the court should award judgment and execution as if he had been convicted by verdict or confession. In 1827, however, standing mute in any criminal case was by statute (7 & 8 Geo., IV) made the equivalent of a plea of not guilty.

This, then, was the background in brief, which led our forefathers to the firm conviction that no man should be compelled

to testify against himself.

If one is asked questions about something, the logical way of looking at his refusal to answer is that he surely must know something about it or else why would he refuse to answer? In other words, it is said that the refusal to answer gives rise to an inference of guilt of something. But the only thing which is sure is that the witness has refused to answer. There are no less than three inferences which may be drawn from such a refusal to testify: (1) That the witness is guilty; (2) that he knows something, or some fact, which might tend to incriminate him; and (3) that he refused to answer because he feels that the inquisitor has no right, or business, to ask him such questions. If we go back to the common law as it finally developed, we find that standing mute, in legal effect, pleads not guilty. How can standing mute be made the cause for punishment of a public servant when it is the legal equivalent of a plea of not guilty? A canon of our law is that it is to be interpreted reasonably in view of accepted common law procedures. We have the old common law which says, in effect, that standing mute is in legal effect a plea of not guilty. We have the present day common assumption that if the witness does not answer, he must have something to hide. And we have the constitutional provisions which say, positively, that no man shall be compelled to be a witness against himself. If he refuses to answer, is he, in effect, pleading guilty to an offense of some sort with the consequent stigma attaching? Or, is he merely standing on his constitutional right which has been guaranteed to him, and if so, should he not be relieved of any and all penalties for having claimed that right?

The privilege against self-incrimination has been characterized by Judge Cardozo (Matter of Doyle, 257 N.Y. 244 (177 N.E. 489, 87 A.L.R. 418)) as "a barrier interposed between

the individual and the power of the government, a barrier interposed by the sovereign people of the State" which "neither legislators nor judges are free to overleap...." In the light of this definition, let us consider the inquiry authorized by the California Legislature in Government Code, section 1028.1.

The section applies to all public employees. It imposes on each such employee the duty to appear and answer under oath certain questions which may be asked of him when subpoenaed by the governmental agency by which he is employed or by a committee of the Congress of the United States or of the Legislature of California, or by any subcommittee thereof. If he refuses to answer under oath on any ground whatsoever any questions of the specified group, he shall be suspended and dismissed from his employment. On the other hand, if he does answer, and his answers indicate that he is a Communist or a member of other proscribed groups, he is subject to dismissal.

A public employee, who is a loyal American citizen, called before such a committee and asked questions pertaining to his membership, past or present, in the Communist Party or in any organization which to his knowledge advocates or advocated during his membership the violent overthrow of the government, might refuse to answer such questions for any one of several reasons: He might have, in the past, joined many different organizations, and has since found that such organizations have been labelled subversive, or have been used as evidence in prosecutions under the Smith Act, or have been the basis of dismissals as "security risks," or have been labelled "pink" by some pseudo-patriot. While he knows that he is innocent of any wrongdoing, he fears that his former membership in various liberal movements, clubs, charities, etc., may be used against him in some way, and would therefore rather keep such information to himself. Although he may be willing to tell the investigators anything about his own

participation in these organization, he feels a sense of loyalty to his friends who had joined with him, and whom he feels are equally innocent of any wrongdoing. He does not want them to be subjected to the public censure which he has encountered because of being called before an investigating body. If he told all that he would be willing to tell about himself, he would have waived the claim of the Fifth Amendment, and could not refuse to answer other questions about his friends. It may also be true that the witness has no first-hand knowledge of the Communist Party or of any other organizations which are of the proscribed type, that he has never joined any organizations of any type, that he is a completely loyal American who believes that the recent rash of security investigations, loyalty oaths, suspicion and distrust has overstepped the boundary of individual liberty and personal security established by the framers of our state and national Constitutions. From his studies of United States history and of the Constitution, he knows that the government has no right to inquire into his private beliefs and associations unless they constitute a clear and present danger to the safety of the nation, which his beliefs and associations obviously do not. He knows that his right to freedom of speech, thought, religion and assembly may not be abridged by the Congress or by the state Legislature. He knows that he may not arbitrarily be deprived of life, liberty or property. He feels that the investigation in which he is involved is not in accord with the spirit which permeates the Constitution, and that to meekly state his innocence would be, in effect, cooperating with those who would destroy or impair the effectiveness of the Constitution and the Bill of Rights. He feels, also, that if he, an obviously innocent person, opposes this invasion into his liberties, the unconstitutional nature of the investigation and of the authority under which it is conducted will be forcefully brought home to the public, and that it will

provide the courts with a clear opportunity to rule on the constitutionality of the statute on which the investigation is based. What a rude awakening it must be when this last witness finds even the courts of his state caught up in the hysteria of the times, to the extent that the statute is held constitutional, and no harm is seen in the dismissal of a loyal public servant with the implication that he is a Communist or that he has been teaching Communist doctrine in his classroom!

Since the statute requires the dismissal of any public employee who refuses to answer the stated questions, on any ground whatsoever, it is too clear to require further discussion that this statute is a legislative attempt to circumvent the Fifth Amendment to the Constitution of the United States and article I, section 13, of the Constitution of California. Since its penalty falls on the innocent as well as the guilty, without even the formality of hearing evidence against the victim, this statute is clearly a deprivation of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Unhappily, there is a tendency on the part of many unthinking members of the public to believe that a witness who invokes a constitutional ground in refusing to testify is disloyal, or is guilty of some misdoing which the investigators were trying to uncover. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.' ...To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources...." (Wieman v. Updegraff, supra, 344 U.S. 183, 190.) I believe that two statements made under oath by Dr. Steinmetz at the same hearing

where he purportedly refused to answer two of the questions of the investigating board should help those who read this opinion to determine whether Dr. Steinmetz is or is not a loyal American, and why he at first refused to answer the disputed questions.

Dr. Steinmetz first stated under oath: "...I should like publicly to reaffirm that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will and have well and faithfully discharged my duties. Allow me, please, to further affirm...that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means; that within the five years... preceding the present moment I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means. Also, as I said, I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or of the State of California....."

Later in the hearing, Dr. Steinmetz explained his reason for at first not answering the questions asked by the board, in these words: "I should like....to say that with regard to this whole business I wish to disclaim any intent at insubordination. I really deny the constitutionality of the act upon which you are depending because it seems to me to threaten my citizenship in a manner in which none of us can or should be subordinate to each

other. The legislation that you have invoked is permissive and not mandatory. You have singled me out for reasons known only to yourselves as if you were exercising a bill of attainder.

"I have been a loyal employee of California since 1930...

"In commenting on your authority I am....indebted... to certain political science professors at the University of California who taught a course in the United States Constitution that became required by the State Legislature of all pedagogical trainees upon the demand, I believe it was, of the American Legion in 1923. Perhaps I have an unfair advantage in this approach to the problem.

"Mr. Blair, it appears in the legislation that you and the Board are applying to me that Mr. Luckel and Mr. Dilworth have sought to provide that every public employee in California may be required individually or collectively to drop his work and appear at the summons of his superior....regardless of existing legal limitations on the responsibility of the superior and the duties of the employee, and to ask the questions at any time and as often as demanded, and requiring me to answer questions regarding not acts but personal advocacies and political memberships, whether these have been clearly outlawed or not. These questions to be, according to the law, as to or pertaining to such, in the wisdom and the relevance of the occupational superior, the questions and answers to be asked and given publicly or privately as the employer wishes, regardless of charges or of no charges having been made and regardless of oaths already given, duties and responsibilities satisfactorily performed and qualifications and tenure rights. The penalty for not answering or for answering in any but one way being dismissal, even if the employee, seeking to avoid a trap for perjury set by those with sufficient influence to have him summoned in the first place, seeks to use the Bill of Rights.

"Now, ladies and gentlemen, I believe that no legislation is valid that incorporates such a transparent attempt to circumvent the Constitution. Behavior allowed by the U. S. Constitution cannot be declared illegal by a state on the grounds that it is insubordinate, particularly when the behavior is admittedly irrelevant to the duties of a subordinate.....

".....I have been summoned to interrogation of a judicial type because I am a public educator but not for anything that I have done as either an educator or a public employee. Indeed, there being no charge against me the situation is utterly paradoxical, so it should not be taking advantage if I were to demand or attempt an explanation. However, since you find none necessary I find it sufficient at the moment simply to point out this fact .....I am sure that all of you members believe in a government of law and not of men, and a government with a clear separation of powers as provided by the Constitution, and I am sure you have probably sworn an oath necessitating such convictions. You must then recognize that the assumption or assignment of judicial powers by or to a legislative committee, or executive agency, or policy commission such as yours is unconstitutional and, if I may add, I think in my opinion subversive to the Bill of Rights.

"The California Legislature has mistakenly authorized you to ask questions that are accusing in effect especially when directed to an individual; questions permitting of but one answer such as usually characterized police state questions; questions that as in my case are totally unnecessary if they are legal because their proper answer is already known so their only point would seem to be to coerce or entrap; questions which have already been answered; and questions which can certainly tempt the unscrupulous to destroy rather than to compete with political opposition by identifying honest dissent with disloyalty in a manner utterly intolerable to free men. Please recognize that I am attributing

no motive to you save perhaps the experimental use of a new law.

"I am really questioning not your authority so much as the authority of the Legislature. Not from the standpoint of distrust in our institutions but obviously with a profound trust in our judiciary and electorate. My viewpoint is less radical than very conservative as befits the descendant of the American Revolution fully acquainted with our national traditions, I hope, and very proud of them. The present is the only part of history for which the individual may be responsible and I feel a profound responsibility for the precedent that I must set in the situation in which you have placed me. I believe that freedom from the political inquisition demeaning public confession and patronizing absolution is necessary for general education, a free press, an instructive and inspiring literature in art, and every other manifestation of culture in America. In these days of vaunted political regard for freedom in the Western World I contend that property rights as well as civil rights are jeopardized by its sacrifice. If I can be arbitrarily summoned for public humiliation and told by the act under which you are proceeding that I cannot use the Bill of Rights to avoid jeopardy from political enemies then no man is safe from those in temporary power, indeed then no secret will be safe and political power may cease to be temporary and become totalitarian. No self-respecting citizen can find satisfaction in work for any employer, public or private, who can hold him under constant threat for political dissent. Public employment ceases to be either right or privilege or duty an obligation under such circumstances.... (I)t is really the vicious permissiveness of the law that threatens. And I oppose that in principle and shall continue to oppose it if it is necessary until the Supreme Court passes upon it....."

One must be indeed naive if he cannot see the parallel between the situation of Dr. Steinmetz before this investigating

board, and the witness called before the ecclesiastical court or Star Chamber in England in the 15th, 16th or 17th centuries. The very evils which prompted an early Congress to add to our Constitution the protection of the Bill of Rights are now being revisited upon us by a statute which purports to protect our constitutional form of government.

Other arguments which are raised by Dr. Steinmetz in his petition, and which I believe are meritorious, are (1) that the Luckel Act (Gov. Code, §§ 1027.5, 1028 and 1028.1) is special legislation which contravenes article I, section 11, and article IV, section 25(33), of the California Constitution; the Fourteenth Amendment to the United States Constitution; and this court's opinion in Communist Party v. Peek, 20 Cal.2d 536 (127 P.2d 889) (see also In re Campbell, 64 Cal.App. 300 (221 P. 952)); (2) that the Luckel Act is, in essence, a bill of attainder (Garner v. Los Angeles Board, supra, 341 U.S. 716, 722; Cummings v. State of Missouri, 4 Wall. (U.S.) 277 (18 L.Ed. 356); Ex parte Garland, 4 Wall. (U.S.) 333 (18 L.Ed. 366); (3) that the Luckel Act offends against the principle of separation of powers (Cal. Const., art. III, § 1, and art. VI, § 1).

In the recent case of Daniman v. Board of Higher Education of New York (reported at 306 N.Y. 532 (119 N.E.2d 373)), the New York Court of Appeals held constitutional a New York City Charter section which in some respects is very similar to the statute being considered in this case. The New York City Charter section (903) directed dismissal of any city employee who should refuse to testify in any authorized hearing or inquiry concerning city affairs or official conduct of officers or employees of the city. Appellant Slochower, a college professor, was dismissed under the authority of this charter section when he refused to state, when asked by a Senate investigating committee, whether he had been a member of the Communist Party. A majority of the

highest court of the State of New York in that case, just like the majority of this court in this case, saw no infringement of the public employee's constitutional rights in the charter provision or in its application. In the Slochower case the Supreme Court of the United States has noted probable jurisdiction. I am confident that the Supreme Court of the United States will reverse the state court decision in the Slochower case. I feel even more strongly that the Supreme Court of the United States should reverse the erroneous decision of the majority of this court in the present case.

In summary, I dissent from the holding of the majority here because I believe (1) that Government Code, section 1028.1, is an attempt by the Legislature to abridge the rights of certain citizens, guaranteed to them by the Fifth Amendment to the Constitution of the United States and by article I, section 13, of the Constitution of California; (2) that Government Code, section 1028.1, as it has been construed by the majority in this case, is unconstitutional under the views expressed in the Wieman, Gerende, Garner, Adler, Pockman and Hirschman cases; and finally, (3) that if Government Code, section 1028.1, should be considered constitutional, then clearly Dr. Steinmetz has not violated its provisions, since he substantially answered all of the questions asked of him by the investigating board.

I am of the opinion that the requested writ of mandate should issue, and that Dr. Steinmetz should be reinstated to his former position.

APPENDIX D

California Assembly Bill No. 3508, 1953 Legislature

An act to add Sections 1027.5 and 1028.1 to the Government Code and to amend Section 1028 of the Government Code, as added by Chapter 1418 of the Statutes of 1947, relating to the duties and the dismissal of public employees.

The people of the State of California do enact as follows:

Section 1. Section 1027.5 is added to the Government Code, to read:

1027.5. The Legislature of the State of California finds that:

(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

(b) This world-wide revolutionary movement is predicated upon and it is designed and intended to carry into execution the basic precepts of communism as expounded by Marx, Lenin, and Stalin.

(c) Pursuant to the objectives of the world communism movement, in numerous foreign countries the legally constituted governments have been overthrown and totalitarian dictatorships established therein against the will of the people, and the establishment of similar dictatorships in other countries is imminently threatening. The successful establishment of totalitarian dictatorships has consistently been aided, accompanied, or accomplished by repeated acts of treachery, deceit, teaching of false doctrines, teaching untruth, together with organized confusion, insubordination, and disloyalty, fostered, directed, instigated, or employed by communist organizations and their members in such countries.

(d) Within the boundaries of the State of California there are active disciplined communist organizations presently

functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement.

(e) One of the objectives of the world communism movement is to place its members in state and local government positions and in state supported educational institutions. If this objective is successful, propaganda can be disseminated by the members of these organizations among pupils and students by those members who would have the opportunity to teach them and to whom, as teachers, they would look for guidance, authority, and leadership. The members of such groups would use their positions to advocate and teach their doctrines and teach the prescribed Communist Party line group dogma or doctrine without regard to truth or free inquiry. This type of propaganda is sufficiently subtle to escape detection.

There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California and their members will infiltrate and seek employment by the State and its public agencies.

Sec. 2. Section 1028, as added by Chapter 1418 of the

Statutes of 1947, of said code is amended to read:

1028. It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence.

Sec. 3. Section 1028.1 is added to said code, to read:

1028.1. It shall be the duty of any public employee who may be subpenaed or ordered by the governing body of the state or local agency by which such employee is employed, to appear before such governing body, or a committee or subcommittee thereof, or by a duly authorized committee of the Congress of the United States or of the Legislature of this State, or any subcommittee of any such committee, to appear before such committee or subcommittee, and to answer under oath a question or questions propounded by such governing body, committee or subcommittee, or a member or counsel thereof, relating to:

(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.

Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law.

Sec. 4. The provisions of this act shall not be applicable to school district employees, it being the intent of the Legislature that similar provisions be made in the Education Code for such employees by other acts.

APPENDIX E

STATES HAVING STATUTES SIMILAR TO THE CALIFORNIA STATUTE INVOLVED IN THIS CASE[1/]

ALASKA

Alaska Laws, 1949, c. 113, p. 290 amending sec. 11-1-8 of Alaska Comp. Laws to require an oath that the employee is not a member of the Communist Party.

CONNECTICUT

Connecticut 1953 Supp. to the General Statutes, Title 24-Chap. 162(b) (1951) Sec. 1462 requires an oath that the employee is not and has never been a member of the Communist Party.

FLORIDA

Florida Statutes, Sec. 876.05 requires an oath that the employee is not a member of the Communist Party and that he has not and will not lend (his) aid, support, advice, counsel or influence to the Communist Party. Section 876.07 provides for the discharge of an employee taking such oath who becomes a member of the Communist Party or who lends his aid, support, advice, counsel or influence to it.

GEORGIA

Georgia Laws - General Acts and Resolutions, Vol. 1, Subversive Activities Act No. 259 (House Bill No. 327) Section 1, February 1953, as amended in the November-December, 1953 session, by Senate Bill No. 156 to define a subversive person as one, inter alia, "who is a knowing member of a subversive organization or a foreign subversive organization."

Section 11 of the Act provides that a subversive person shall not be employed or retained in employ, and that all applicants and

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1/ This brief resume does not purport to be a complete compilation of all the statutes of all states having to do with so called loyalty-security-subversive activities matters. (See Gellhorn, The States and Subversion, Cornell University Press, 1952, Appendices A and B.) The material for this Appendix was collected by Mrs. Ruth Jacobs of Los Angeles.

employees must sign a written statement or questionnaire containing answers to inquiries material to ascertain whether the employee is a subversive person.

HAWAII

Requires an oath that the employee does not hold membership in, pay assessments, dues or make contributions to any organization or political party which advocates the overthrow of the government of the United States or any change in its government except as provided by its constitution. (Chap. 13, Laws of the Territory of Hawaii, Loyalty Law Series, A-21, Act 54, Section 600). Sections 580.05 and .06 require the execution of statements calling for such information as shall be prescribed. Failure to take the oath means ineligibility to, or loss of employment (Sections 601-606).

IDAHO

1955 Cum. Pocket Supp., Idaho Code, Vol. 8, Title 46 requires an oath that the person is not a member of any political party or organization that advocates the overthrow of government by force or violence.

ILLINOIS

Section 30a of "an act in relation to State finance", approved June 10, 1919, as amended by Senate Bill 58, 1955 legislature, provides that no compensation can be paid to any employee, inter alia, who knowingly joins, or knowingly remains for 20 days, a member of any organization which advocates the overthrow of government by force after he has knowledge, or reasonable cause to believe, that such organization of which he is or about to become a member, advocates or is affiliated with another organization which advocates, the overthrow of government by force.

Section 30b requires the employee to file an oath that he is not a member of nor affiliated with the communist party and that he is not knowingly a member of nor knowingly affiliated with any

organization which advocates the overthrow of the constitutional form of government of the State or Nation by force, violence or other unlawful means. Rev. Stat. C. 24½ Sec. 8, provides that no person who is a member of any communist, nazi or fascist organization, or who participates in any activity of such group, shall be eligible to take a civil service examination.

KANSAS

Gen. Stats. of Kans. Am. 21-301 provides for dismissal of any employee who refuses to take an oath that he is not a member of any organization that advocates the overthrow of government by force or violence.

LOUISIANA

Wests Louisiana Stats. Ann. Rev. Stats. Vol. 9, 1954 Cum. Annual Pocket Part Title 14, in Section 376 provides for the signing of a written affidavit containing answers to such inquiries as may be material in ascertaining whether the person is a subversive person. Section 366 defines a subversive person, inter alia, as one who is a member of a subversive organization or a foreign subversive organization. The latter, in turn, are defined respectively as engaging in, advocating, teaching, etc. the overthrow of the government of the United States or Louisiana by force or violence or other unlawful means, and engaging, teaching, etc. the overthrow of these governments under control, direction, etc. of a foreign government, organization or individual. Section 375 renders a subversive person ineligible for employment and Section 379 requires an affidavit to the effect that he is not a subversive person by a candidate for office.

MARYLAND

The Maryland Statute (Art. 85A, Maryland Ann. Code, General Laws) was the subject of this court's decision in Gerende v. Board of Supervisors, 341 U.S. 56.

MICHIGAN

Compiled Laws 752.328 (1952 - Act 117) provides for discharge of any employee as to whom reasonable grounds exist that the person is a communist or a knowing member of a communist front organization; and it provides that the refusal of the employee to testify concerning his being a communist or a member of a communist front organization on the ground that his answers might tend to incriminate him, shall be prima facie evidence that such a person is a communist or a knowing member of a communist front organization.

MISSISSIPPI

Sec. 4064-03 of Miss. Code. Sup. Vol. 3, provides that rules be established by an appointing or employing agency to ascertain whether a person is subversive. Sec. 4064-05 provides that every person in the employ of Mississippi must sign a written statement that he is not a subversive person.

NEBRASKA

Section 11-101.01, Revised Stats. requires all public employees, except those exempted by the Nebraska Constitution to take an oath that they are not members of any organization that advocates the overthrow of the government by force or violence.

NEW JERSEY

Ann. Stats. 41:1-3 and 18:13-9.2 require an oath that the employee is not a member of or affiliated with any organization which approves, advocates, or practices the use of force or violence or other unlawful or unconstitutional means, to overthrow or make any change in the governments of the United States or New Jersey.

NEW HAMPSHIRE

New Hampshire Laws, 1951, Ch. 193, to be called 457-A provides that no subversive person may be a public employee (Sec. 9). Sections 10 and 12 require a written statement containing answers to such questions as may be material to ascertain whether the employee is a subversive person and that he is not a member of a

subversive organization.

NEW YORK

The Feinberg Law was the subject of this court's decision in Adler v. Board of Education, 342 U.S. 485.

OKLAHOMA

The old Oklahoma statute as applied to professors at the Oklahoma Agricultural and Mechanical College was the subject of this court's decision in Wieman v. Updegraff, 344 U.S. 183. Subsequent to that decision, the statute was amended (Secs. 36.1, 36.2, Okla. Statutes Ann. Title 51) to require an oath that the employee is not a member of or affiliated with the Communist Party or the cominform or with any organization known to the employee to advocate the overthrow of the Government of the United States or Oklahoma by force or violence.

PENNSYLVANIA

Title 65, Purdon's Penn. Stats. Ann. Section 213 provides that no subversive person shall be eligible for public employment. Section 214 requires the apppointing authority to establish procedures for ascertaining that fact and it requires a written statement that the person is not knowingly a member of any organization that advocates the overthrow of government by force or violence and that the person will not knowingly become a member of such an organization during the period of his employ. Section 215 requires the discharge of persons who refuse to sign such a statement. Section 224 is similar for candidates for elective office.

RHODE ISLAND

R. I. General Laws C. 176, secs. 1 - 2, (1938) enables the requirement of an oath for teachers.

SOUTH CAROLINA

S. C. Code § 5324(3) is essentially the same as Rhode Island.

SOUTH DAKOTA

Requires an oath that the employee is not and has not been within

one year a member of any organization that advocates the overthrow of the government by force or violence (Sess. Laws S.D. 1955, Ch. 271, S.B. 122, § 1). The same is essentially true for employees of civil defense organizations (§§ 55.11A 14, Supp. to So. Dak. Code of 1939) and for teachers (So. Dak. Code, § 15.3702).

TENNESSEE

Tenn. Code Ann. § 2540-3 is essentially the same as Rhode Island.

TEXAS

Vernon's Revised Civil Stats. of Texas, Art. 6252-7, in Section 1 provides for an oath that the employee is not and never has been a member of the Communist Party or is not and has not been for 5 years a member of any organization on the United States Attorney General's list designated as totalitarian, fascist, communist, subversive, etc.; if a member of any of the latter organizations he shall state that during the time of membership he did not know that its purposes were the purposes which the Attorney General has designated; the statement also requires the person to state that he is not and has not been for 5 years a member of any Communist Political or Communist Front Organization required to register under the Federal Internal Security Act of 1950 (50 USC 781 et seq.) or if so that during the time of membership, he did not know that its purpose was to further the goals of the Communist Party or that it was controlled by the Communist Party.

VIRGINIA

Va. Code Ann. § 664 (Supp. 1948) is essentially the same as Rhode Island.

WASHINGTON

Rev. Code of Wash., Ann., Title 9.81.060 provides that no subversive person shall be eligible for public employ. Title 9.81.070 provides that procedures be established to ascertain whether a person is a subversive person. In connection with the latter the employee is required to sign a written statement containing answers to such

questions as may be material. Title 9.81.100 is essentially the same with regard to candidates for public office.

WYOMING

Wyo. Comp. Statutes, Title 30 - 814(a) provides for an oath for any person in a Civil Defense Organization to the effect that the person is not a member or affiliate of any organization that advocates the overthrow of government by force or violence.

COPY

FILED
OCT 27 1955
HAROLD B. WILLEY, Clerk

No. 288 Misc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

HARRY C. STEINMETZ, *Petitioner,*

v.

CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as State Director of Education, and CALIFORNIA STATE PERSONNEL BOARD, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully present the following matters in opposition to the Petition for Writ of Certiorari.

JURISDICTIONAL QUESTION

The petition has failed to present grounds for the exercise of the United States Supreme Court's jurisdiction for the following reasons:

1. The decision of the California Supreme Court (as well as that of the California District Court of Appeal) was based on independent and adequate non-federal grounds sufficiently broad amply to sustain its judgment.

2. There is no substantial federal question involved.

3. The constitutional grounds upon which petitioner relies are not available to him because they are based upon hypothetical propositions not presented by the factual record of this case.

Throughout the proceedings in the California Courts, petitioner continuously indicated that his refusal to answer two of the questions put to him was solely in order to test the constitutionality of the Luckel Act. (Government Code Secs. 1027.5, 1028, and 1028.1.*) Petitioner has felt aggrieved by the continued refusal of the California courts to reply to his broad-scale attack. The California courts, however, like this honorable court, have followed the wise and sensible rule of reaching constitutional issues last, not first (*Peters* v. *Hobby*, 349 U. S. 331, 338). Petitioner has been unable to recognize that the state of the record in the instant proceedings does not provide him with a vehicle sufficiently equipped to reach the many constitutional grounds asserted.

STATEMENT OF THE CASE

Petitioner, an associate professor at San Diego College, was dismissed by the State Board of Education following his refusal to answer two questions put to him by the board concerning membership in the Communist Party. The questions were: "Are you knowingly a member of the Communist Party?" and, "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" The questions were asked pursuant to Government

* (All statutory references hereafter are to California Code sections.)

Code Section 1028.1,[1] and the dismissal for refusal to answer was required by Section 1028.1.

Petitioner appealed this dismissal to the State Personnel Board which board, after a hearing, affirmed the dismissal and found that petitioner had failed to answer the two questions above quoted and that by reason of said failure petitioner was guilty of a failure and refusal to perform the normal and reasonable duties of his position within the meaning of Section 20396(e)[2] of the Education Code, was guilty of in-

[1] California Government Code Section 1028.1 provides as follows:

"It shall be the duty of any public employee who may be subpenaed or ordered by the governing body of the state or local agency by which such employee is employed, to appear before such governing body, or a committee or subcommittee thereof, or by a duly authorized committee of the Congress of the United States, or of the Legislature of this State, or any subcommittee of any such committee, to appear before such committee or subcommittee, and to answer under oath a question or questions propounded by such governing body, committee or subcommittee, or a member or counsel thereof, relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

"(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.

"Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

[2] California Education Code Section 20396(e) provides as follows:

"A permanent or probationary academic teaching and administrative employee may be dismissed or demoted and nonacademic employees may be dismissed, demoted or suspended for the following causes:

* * * * *
* * * * *
* * * * *
* * * * *

"(e) Failure or refusal to perform the normal and reasonable duties of the position."

subordination, and was guilty of violating Section 1028.1 of the California Government Code.

Petitioner sought a writ of mandate from the California District Court of Appeal to compel his reinstatement. The court denied the writ (its opinion is attached to the Petition for Writ herein, App. B). Petitioner then sought a writ of mandate from the California Supreme Court. That court also denied relief (a copy of its opinion is attached to the Petition for Writ herein, App. C).

STATEMENT OF FACTS

We adopt the facts as stated in the opinion of the California Supreme Court (see Petition for Writ herein, App. C, pp. 1, 5).

ARGUMENT

I. The Decision of the California Supreme Court Was Based on Independent and Adequate Nonfederal Grounds Sufficiently Broad Amply to Sustain Its Judgment and No Substantial Federal Question Is Involved.

The California Supreme Court was explicit in its refusal to reach the many constitutional issues raised by petitioner. The court made it clear what it was and what it was not deciding. The court reiterated what is now well established, namely, that the Legislature may properly ask a public employee whether he is a member of the Communist Party, knowing merely that he was such a member (Petition for Writ herein, App. C, pp. 6, 7), and determined that this is what the Legis-

lature intended to ask (App. C, p. 6); that this is what was asked (App. C, p. 6); that petitioner understood the question as asked (App. C, p. 5); and, that he refused to answer (App. C, p. 5). The court went to great length to make clear that the dismissal was based not because of membership, innocent or otherwise, in the Communist Party, but because of petitioner's refusal to answer questions as to his membership in the Communist Party (App. C, pp. 7, 8, and 10).

Although the court held that Government Code Section 1028.1 did not violate the provisions of the California Constitution prohibiting the passage of special laws, it specifically stated that it was not determining the validity or applicability of Government Code Section 1028 (App. C, p. 10).[3]

The only federal question that was conceivably involved in the facts presented and in the decision of the California Supreme Court was whether petitioner, as a public employee, could constitutionally be required to disclose his past or present knowing membership in the Communist Party without reference to his knowledge of the character of the organization (or, as it is phrased by petitioner, "membership qua membership"). We submit that this no longer constitutes

[3] Similarly, the opinion of the California District Court of Appeal made it clear that it was determining only (1) whether the State Legislature acted properly in enacting Government Code Section 1028.1; (2) what the word "knowing", as used in the questions asked, meant; (3) whether the questions were relevant; and, (4) whether petitioner answered the questions. Said the District Court: "We are not called upon to do more, and we do no more, than to determine whether or not (petitioner's) refusal to answer these two questions constituted cause for his dismissal. We are not concerned with and do not decide what would be proof of disloyalty in fact sufficient for dismissal upon that ground." (App. B, p. 3.)

a substantial federal question. Petitioner is only traveling a road clearly marked by Pacifico and Schwartz in the *Garner* case. (*Garner* v. *Los Angeles Board,* 341 U. S 716.)

The honorable court stated:

> "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." (341 U. S. at page 720.)

Said Justice Frankfurter concurring in part:

> "But the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party or the Communist Political Association cannot successfully appeal to the Constitution of the United States." (341 U. S. at page 726.)

Said Justice Burton concurring in part:

> "I agree with the court that the judgment should be affirmed as to petitioners Pacifico and Schwartz. They executed the oath but refused to sign an affidavit calling for information as to their past or present membership in the Communist Party or the Communist Political Association. Such refusal does not now present the question of whether the Constitution permits the City to discharge them from municipal employment on the basis of information in their affidavits. We have before us only the question of whether municipal

employees may be required to give to their employer factual information which is relevant to a determination of their present loyalty and suitability for public service." (341 U. S. at pages 729-730.)

II. "Petitioner's Contentions Are Broader Than the Issues Presented by the Facts Presented in the Record"

(*Steinmetz* v. *State Board,* decision of the District Court of Appeals; see Petition for Writ herein, App. B, p. 3.)

Petitioner's entire argument challenging the constitutionality of the Luckel Act is based upon hypothetical propositions that are unsupported by the factual record in this case.

It is well settled that the courts, including this honorable court, will not give their consideration to questions involving the constitutionality of a statute based upon hypothetical questions not presented by the record before the Court.

> *Bandini* v. *Superior Court* (1931), 284 U. S. 8, 52 S. Ct. 103, 108; *People* v. *Perry* (1931), 212 Cal. 186, 193, 298 Pac. 19.

Thus, the California Supreme Court said,

> "*We need not determine* whether there is any merit in petitioner's attack upon another section of the Luckel Act which provides that it shall be sufficient cause for dismissal when a public employee advocates, or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates,

> the overthrow of the government by force or violence. (Gov. Code, § 1028.)" (App. C, p. 10.) (Emphasis added.)

Similarly, the District Court of Appeal said,

> *"But we are not now discussing, nor are we required here to discuss,* the limitations that must be imposed upon separation from service lest the innocent be discharged as well as the guilty." (App. B, p. 7.) (Emphasis added.)

Yet the only questions raised by petitioner go to the application and validity of Government Code Section 1028. But petitioner's attack on this inapplicable statute rests on nonexistent facts. If, says petitioner, he had answered the questions, and if he had answered them in the affirmative (although he states that if given the opportunity, he would answer them with a categorical "no"), then petitioner would like to know whether, without any further questioning, he would have been dismissed under Government Code Section 1028.

We must emphasize that the California courts have not determined that the Luckel Act or any of its provisions authorize or require the dismissal of a public employee for membership in the Communist Party without reference to his knowledge of the character of the organization. This question has not been decided or inferentially passed upon by any California Court. But more basic is the fact that this issue is not before this honorable court in this case.

III. The Facts in This Case Do Not Warrant Granting Petitioner's Request That He Now Be Allowed to Answer the Unanswered Questions

The *Garner* case does not support petitioner's request that he now be allowed to answer the unanswered questions. In the *Garner* case only those who refused to take the oath, and not those who refused to sign the affidavit, were provided a second chance. And that opportunity was provided them only because the court felt that its interpretation (that scienter was implicit in each clause of the oath) " * * * may not have been explicitly called to the attention of petitioners before their refusal" (341 U. S. at p. 724).

Here, however, we are not dealing with an oath requirement in which one and only one answer would be acceptable. We are dealing with what is, in effect, an affidavit. We are dealing with the right, not to a particular answer, but the right to an answer—the right to information. Petitioner indicated by all of his comments that he was well acquainted with the problems and cases involved in this area. Represented as he was by attorneys who submitted briefs in the *Garner* case, petitioner cannot, and does not, claim to have been ignorant of the holding of the *Garner* case. His statement to the Board of Education shows clearly that he understood the questions put to him. To paraphrase the court's language in *Wieman* v. *Updegraff* (344 U. S. 183) here, with this court's decision in the *Garner* case literally before him, there is no basis in

the instant proceedings for holding that this petitioner may not have understood his obligation to provide the requested information and that he should now be afforded an opportunity to answer the questions.

In addition, it is significant to note that petitioner's request is one that was not made before any California tribunal.

We have no desire to be either harsh or vindictive nor do we oppose inquiry into the construction of the Luckel Act. Had there been, on the part of petitioner, a real and honest confusion as to the meaning of the questions asked, or had the legality of those questions been open to reasonable doubt, we would not so strongly oppose petitioner's request. But here this honorable court is not being asked to provide a second chance for an allegedly confused person, but is being asked to provide a technique for testing constitutional issues which, we respectfully submit, are not presented by the facts in the instant case.

CONCLUSION

Respondent respectfully urges that for the foregoing reasons this honorable court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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No. 288, Misc.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

THE CALIFORNIA SUPREME COURT'S JUDGMENT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS; AN IMPORTANT AND SUBSTANTIAL FEDERAL QUESTION IS INVOLVED (Reply to Respondents' Point I, pp. 4-7)

It is difficult to follow respondents' suggestion. The opinion of the court below fairly bristles with decisions on federal constitutional grounds. Thus the court relies upon this court's decisions in Adler v. Board of Education, 342 U.S. 485 and Garner v. Board of Public Works, 341 U.S. 716 (Pet. Appx.C, p. 7), cases clearly decided by this court on federal constitutional grounds, and it attempts to distinguish this court's decisions in Wieman v. Updegraff, 344 U.S. 183, Adler, Garner and Gerende v. Baltimore City Board of Supervisors, 341 U.S. 56, (Ibid, pg. 8) all, also, clearly decided on federal constitutional grounds.

Respondents do not disclose what the non-federal grounds were upon which to sustain the California court's decision.

Moreover, respondents themselves point out the important and fundamental federal constitutional question involved when they pose this question (Br. 5):

> "whether petitioner, as a public employee, could constitutionally be required to disclose his past or present knowing membership in the Communist Party without reference to his knowledge of the character of the organization."

Petitioner from the beginning maintained that to so require disclosure under those circumstances violated the Due Process clause of the 14th Amendment, and the Wieman, Adler, Gerende and Garner decisions of this court. As seen, he was specifically turned down on this issue by both the courts below. (Pet. Appx. B. pg. 8; Appx.C. pp. 6, -8).

Respondents urge (Br. 5) "that this no longer constitutes a substantial federal question" by reason of this court's decision in Garner v. Los Angeles Board, 341 U.S. 716. We agree that the Garner case has great bearing on the issue in this case. Our difference with respondents being that the decision of the court below is in conflict with the Garner decision, as well as with Adler, Gerende and Wieman.

Respondents, we respectfully submit, fail to appreciate, even more than did the respondents in Wieman, what this court had ruled in Garner. The case here is not like the affidavit phase of the Garner case, but rather like the oath phase of that case.

The point is this. In Garner, "the validity of the oath turns upon the nature of the Charter amendment (1941) and the relation of the ordinance (1948) to this amendment." (341 U.S. at 720). This court assumed "that under the Federal Constitution

the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so." (pg. 720) Accordingly, this court held the oath not violative of constitutional right, but only if "scienter is implicit in each clause of the oath." (pg. 724).

This was not the situation as to the affidavit phase of the case. As to this phase there was no provision, comparable to the charter provision relevant in the oath phase, barring from employment persons who are or were members of the Communist Party or the Communist Political Association. Therefore the only thing involved in the affidavit phase was inquiry into matters relevant to fitness or suitability for employment.

In the case at bar, however, as with the oath phase in Garner, there is a provision[1/] (Govt. Code 1028) which bars from public employment persons who are knowingly members of the Communist Party. Accordingly, as with the oath in Garner, "the validity of (the questions asked petitioner and of Govt. Code 1028.1(d), pursuant to which they were asked) turns upon the nature of (Govt. Code 1028) and the relation of (Govt. Code 1028.1(d)) to this (section)." As with the oath phase in Garner, it may be assumed "that under the Federal Constitution (section 1028) is valid to the extent that it bars from the" state's public service persons who are knowingly members of the Communist Party. But, just as with the oath in Garner, precisely because of the presence of that section 1028, questions concerning that membership are only valid under the Due Process Clause if "scienter is implicit in each" of them. For otherwise, as this court made so clear in Wieman, requiring answers to such questions absent the element of scienter (which the court below said was what 1028.1(d) did) indiscriminate-

1/ Indeed two provisions. The other is Govt. Code 20398(a).

ly classifies "innocent with knowing activity and must fall as an assertion of arbitrary power." (Wieman v. Updegraff, 344 U.S. 183, 191).[2/]

Accordingly, therefore, it is clear, that there is a substantial federal question in this case and that it was wrongly decided by the court below.[3/]

II

PETITIONER'S CONTENTIONS ARE NOT BROADER THAN THE FACTS PRESENTED BY THE RECORD (Reply to Respondents' Point II, pp. 7-8)

Like the court below, respondents fall into the error which causes them to make the assertion because, as pointed out above under Point I, they did not apprehend what this court said in Garner. Thus, respondents say (Br. 8) (and they point to no reference to the Petitioner to sustain them) "the only questions raised by petitioner go to the application and validity of Government Code Section 1028." But that is not the case at all. Petitioner repeats here what he said in his petition (pg. 13) that no such direct attack on Government Code 1028 is being made. But

2/ We do not believe that the fact that here the problem is framed by way of the question-answer method, while in Garner and Wieman it was framed by way of an oath, makes any difference. Were this to be the crucial difference, then the very careful constitutional point made by this court in Garner, Adler, Gerende and Wieman, could be thus so simply evaded. We do not believe that the constitutional right to freedom from the assertion of arbitrary power rests on so slender a reed.

3/ Apropos the quotation from Justice Burton's concurring opinion in Garner, set forth by respondents at pgs. 6 and 7 of their reply, is this: in Garner, as to the affidavit phase, this Court said that all that was before it was whether an employee may be required to give an employer factual information relative to a determination of present loyalty and suitability. The answer there was yes. But not answered in Garner, and present in this case, is the question as to whether, where an employee answers all questions asked relative present loyalty and suitability (which petitioner here did), the state can nevertheless discharge him for not answering questions which the state had no right to put, because of their being an assertion of arbitrary power.

the fact that no such attack was or is made, does not justify pretending that the section does not exist, anymore than it could be pretended that the charter provision in the oath phase of the Garner case did not exist. Indeed it is the very presence of the section 1028, and assuming its validity, which makes 1028.1(d), as interpreted by the court below, violative of due process because the court below disregarded the admonition of this Court in Garner that to sustain, there the oath, here the questions, scienter must be present. But it is this scienter which the court below specifically ruled out.

III

THE FACTS OF THIS CASE DO WARRANT PERMITTING PETITIONER TO ANSWER NOW (Reply to Respondents' Point III, pp. 9-10)

In the light of the vigorous and exhaustive dissent by Justice Carter in this case in the court below it is difficult to see the validity of respondents' suggestion that the meaning of the questions or their legality were not open to reasonable doubt. Indeed, in view of the analysis above and of this Court's pronouncements in the Garner, Adler, Gerende and Wieman cases, petitioner is still of the view that absent the scienter requirement, the questions do violate due process. Be that as it may, it cannot be said that the question was or is so clear.

This case is the converse of Garner. There, this Court, sua sponte ordered that petitioner have a chance to take the oath as finally interpreted to include scienter. Here the court should do the same if it finally determines that the questions are valid absent scienter. The basic principles of justice inherent in this Court's ruling in Garner are equally applicable here.

C O N C L U S I O N

The petition for writ of certiorari should be granted.

Respectfully submitted,

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